Supreme Court, U. S.
FILED
FEB 19 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Case No. 79-1378

TOMAS ROSARIO, OVIDIO VEGA and RAY CABEL,

Petitioners,

v.

AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, I.L.G.W.U., ABE DOLGEN, individually and as Manager of AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, I.L.G.W.U., and INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BURTON H. HALL
HALL, CLIFTON & SCHWARTZ
401 Broadway
New York, N.Y., 10013

Attorney for Petitioners

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit of July 17, 1979, affirming in part

and reversing in part the judgment of the United States District Court for the Southern District of New York, entered on June 23, 1978.

Opinions Below

The Opinion of the District Court of November 14, 1977 is reported at 441 F.Supp. 657 and appears in Appendix at page 47a.

The Opinion of the Court of Appeals of July 17, 1979 is reported at 605 F.2d 1228 and appears in Appendix at page 1a.

Jurisdiction

The judgment of the Court of Appeals was entered July 17, 1979. A timely petition for rehearing with a suggestion for rehearing en banc brought by Petitioners was denied on November 20, 1979. This petition for certiorari is filed within ninety days of the latter date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and in accordance with Rule 19(b) of this Court.

Questions Presented

1. Does a labor organization infringe the equal rights and privileges of a member, guaranteed him by §101(a)(1) of the LMRDA, to attend and participate in membership meetings, when it imposes upon him a disciplinary "suspension" from the right to attend membership meetings in the future?

2. Do the due process rights guaranteed to union members by §101(a)(5) of the LMRDA include the right of an accused to be notified that a scheduled hearing will be a trial of the charges against him?

3. When the circumstances of an intra-union disciplinary trial are such as to make the atmosphere "hardly conducive to impartial resolution of the issues" and to present "the obvious danger that [the decision makers will] not be fair and impartial" (App.27a), and there is no evidence rebutting the inference of probable unfairness, should the trial be

presumed to satisfy the "full and fair hearing" requirement of §101(a)(5)(C) of the LMRDA?

4. When union members have been unlawfully, in violation of §101(a)(5) or §609 of the LMRDA, disciplined by their union or an officer thereof, are they entitled to:

(a) nominal damages, at the least, for their unlawful discipline?

(b) compensatory damages for such mental or emotional anguish as a jury may infer they suffered as a result of the discipline?

(c) punitive damages, as the jury may award, to vindicate LMRDA rights and deter future violations, regardless of whether the jury has awarded compensatory damages?

5. Does an erroneous but unobjected-to jury instruction, barring punitive damages in the absence of compensatory damages, become so completely the law of the case that a court of appeals, upon reversing the compensatory damage award, must reverse the punitive

award as well?

Statutes Involved

Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act of 1959 (or "LMRDA"), 29 U.S.C. §411(a)(1), provides as follows:

> EQUAL RIGHTS. -- Every member of a labor organization shall have equal rights and privileges within such labor organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

Section 101(a)(5) of the LMRDA, 29 U.S.C. §411(a)(5), provides as follows:

> SAFEGUARDS AGAINST IMPROPER DISCIPLINARY ACTION. -- No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Section 102 of the LMRDA, 29 U.S.C. §412, provides as follows:

> Any person whose rights secured by

this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Section 609 of the LMRDA, 29 U.S.C. § 529, provides as follows:

> It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwie discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section.

Statement of the Case

The three petitioners are members of respondent Local 10 who, within the union, have long actively criticized the officials of the union (Local 10) and its parent (ILGWU) and their policies. On January 29 1975, they went to the office of Dolgen,

the Manager of Local 10 (on Dolgen's invitation), to protest unfair job referral practices. Dolgen tricked two of them into remaining in the office, and had them arrested on false charges of trespass; App. 7a-8a, 38a, Sp.Qs. 1 & 2, 118a.

The criminal charges were dismissed, but Dolgen then brought intra-union charges against petitioners, based on the same false allegation, that they had remained in his office after being asked to leave, thereby "obstructing" his functions (49a-50a).

On these false charges, petitioners were subjected to a succession of intra-union trials and punishments. At least the first three (conducted by Local 10) were manifestly unfair, for reasons summarized by the District Court (48a-65a; and see: 7a-12a). The jury found that Dolgent "dominated and manipulated" the trials and punishments "in order to get revenge against [petitioners]"; Sp.Q. 4, App. 1118a.

After each trial, a disciplinary punishment was imposed, taking effect immediately. The first "suspended" petitioners from all union activities; each subsequent punishment "suspended" them from attending membership meetings of Local 10.

After each punishment was imposed, the three petitioners appealed within the union. A Special Appeal Committee of ILGWU's General Executive Board (or GEB) upheld the first appeal to the extent of ordering Local 10 to conduct a new trial. But it affirmed the second punishment, and petitioners thereafter brought the first of these two (since consolidated (App. 47a)) cases. Shortly after suit was instituted, however, the GEB itself, on its own motion, ordered a third trial. Petitioners' appeal from the third punishment went to a hearing before the Special Appeal Committee, but the Committee aborted the hearing and failed to rule on the appeal (App. 65a, 92a-93a,

fn. 33). After waiting six months, the petitioners instituted the second of these actions.

Upon bringing the second action, petitioners moved for a preliminary injunction, enjoining effectuation of the third disciplinary "suspension," which was imposed January 29, 1976, following the third union trial. Such an injunction was granted. The unions appealed, but the Court of Appeals affirmed (without opinion) on November 9, 1976.

On December 14, 1976, following affirmance by the Court of Appeals, the Executive Committee of ILGWU's GEB announced a "Decision" directing that the appeal that petitioners had taken from the January 29, 1976 "suspension" would be heard by a new Special Appeal Committee of the GEB (App. 67a-68a). Repeatedly, throughout the "Decision," it was emphasized that the hearing was to be on the members' appeal

from the January 29, 1976 decision of Local 10's Trial Committee. Together with the "Decision," the petitioners were sent a covering letter, explaining that the "Decision" was "in connection with the appeal" they had taken (App. 68a).

By letter of February 29, 1977, the petitioners were informed by that the Special Appeal Committee would hold "a hearing de novo on the appeal from the Trial Committee's decision of January 29, 1976" on March 23, 1977 (App. 68a-69a).

Petitioners responded by letter of March 14, 1977, saying that they would not attend the appeal hearing, since they had already exhausted their appeals from the January 29, 1976 decision of Local 10's Trial Committee and saw no need for a new appeal hearing (App. 69a).

Replying to Petitioners' letter, the Secretary of the Appeal Committee again described the hearing to be held as a "hearing de novo on your appeal." (App. 69a).

There was no suggestion, in any of this correspondence, that the hearing to be held was to be anything other than a hearing on the appeal that petitioners had taken, a year earlier, from the January 29, 1976 decision of Local 10's Trial Committee (which decision both Local 10 and ILGWU were enjoined from effectuating).

Petitioners, accordingly, did not attend the March 23, 1977 hearing.*

On April 11, 1977, the Appeal Committee announced that the March 23, 1977 had been a "de novo trial" of petitioners on Dolgen's charges, and that petitioners had been found guilty in absentia. It sent petitioners copies of a transcript of the

*Under the ILGWU constitution a member may either attend his appeal hearing or rest on his written appeal. Up to then, petitioners' practice had varied: they attended the hearing on their first appeal; they did not attend on the second; and they attended the hearing on the third appeal but the Committee aborted that hearing because of their insistence upon making a tape record.

hearing and also a "Statement and Decision," finding them guilty and imposing, once again, a disciplinary "suspension" from the right to attend membership meetings (App. 70a).

The three members moved to hold ILGWU in contempt of the preliminary injunction; the motion was denied. They then pursued their last union appeal, to ILGWU's convention. After the convention denied their appeal, they moved again in court, this time to enjoin effectuation of the Special Appeal Committee's disciplinary "suspension." This motion was granted.

On November 14, 1977, the District Court, Judge Motley, ruled on various motions to dismiss, for summary judgment, for preliminary injunction, and for leave to file a supplemental complaint (App. 47a-107a). On the issue of Dolgen's liability a further memorandum was handed down on April 6, 1977 (108a-112a).

Judge Motley's decision of November 14,

1977 found that none of the four disciplinary hearings -- the three Local 10 trials and the Appeal Committee's "appeal" hearing -- met the test of a "full and fair hearing" and ruled that the disciplinary "suspension" itself infringed LMRDA-guaranteed rights and was therefore invalid. It reserved damage claims for trial.

The jury awarded compensatory and punitive damages against both Dolgen and Local 10 on the LMRDA wrongful discipline claims (App. 120a-122a) and against Dolgen on the false arrest and malicious prosecution claims (App. 119a-122a). Monetary claims against ILGWU were dismissed by the Court (App. 113a).

The Court of Appeals reversed all the damage awards on the LMRDA claims, on the ground that there was no actual evidence that petitioners' emotional suffering (which was evidenced) was "causally connected" to the wrongdoing (App. 33a,

35a). It also ruled that the fourth disciplinary hearing (that conducted by the Special Appeal Committee) "must be viewed as a full and fair hearing" (App. 31a) and that the "suspension" from attending membership meetings was valid and lawful (App. 15a-19a). It agreed with the District Court that the Local 10 trials were unfair and unlawful (15a-19a), and upheld the damage awards against Dolgen on the false arrest and malicious prosecution claims (36a-46a).

Plaintiffs duly petitioned for rehearing on July 31, 1979 but their petition was denied by an order dated November 20, 1979.

REASONS FOR GRANTING A WRIT

I

The decision below, permitting a union to deny a member, by disciplinary means, rights guaranteed by §101(a)(1) of the LMRDA to "[e]very member," is in conflict with the Ninth Circuit's decision in Stachan v. Weber.

§101(a)(1) of the LMRDA (p. 5, supra) guarantees to "[e]very member" of a labor organization equal rights and privileges within such labor organization to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings subject to the organization's established reasonable rules.

§101(a)(1) is part of Title I of the LMRDA, the "Bill of Rights of Members of Labor Organizations, which was, as this Court noted in Hall v. Cole, 412 U.S. 1, 7-8 (1973), "specifically designed to promote the 'full and active participation of the rank and file in the affairs of the union." In enacting it, Congress rea-

soned that, as Senator McClellan put it, II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (NLRB, Wash. D.C., 1960) 1103(1),

> "If we want fewer laws -- and want to need fewer laws -- providing regulation in this field, we should start with the basic things. We should give union members their inherent constitutional rights, and we should make those rights apply to union membership as well as to other affairs of life. We should protect the union members in those rights. By so doing we will be giving them the tools they can use themselves."

The question whether, by disciplinary means, a union may deprive one or more members of some of those rights came before the Ninth Circuit in Stachan v. Weber, 535 F.2d 1202 (1976), where union members were disciplinarily barred from attending the initial portions of membership meetings. Facing the question whether Title I "prevents the union from applying the challenged sanction," the Ninth Circuit ruled as follows:

> "The District Court correctly held that the union cannot exclude appellees from the meeting. The exclusion would clearly violate the equal rights section of the Act, 29 U.S.C. §411(a)(1)."

It went on ("Moreover, ...") to add that the conduct for which the members had been disciplined was also protected.

Stachan is directly in point here, and the District Court, after analyzing both the language and the Congressional intent behind §101(a)(1) (App. 73a-74a), came to the same conclusion as did the Ninth Circuit and cited Stachan with approval (74a). Judge Motley noted Congress's intent "to ensure that internal union democracy would not be sacrificed on the altar of internal efficiency ... and that the rights of free expression and political participation would be carefully protected. Suspension of members from the right to attend membership meetings would negate that intent:

> "Suspension of the right to attend membership meetings and to attempt there to sway the minds of fellow union mem-

> bers seems clearly incompatible with the notion that freedom of speech within the union is a right of paramount importance."

Thus (App. 74a),

> "... the availability of alternative modes of punishment, such as fines, which do not impede the rights of expression; the fact that suspension from membership meetings can so easily be used as a means for censoring dissident views; the strong policy in favor of internal union democracy; and the plain language of the statute itself all lead this court to the conclusion that a union is prohibited by statute from imposing a punishment such as that imposed in the instant case."

The Second Circuit, reversing Judge Motley, calls her interpretation of §101(a)(1) "literalistic" (15a) and "literal", sing both terms pejoratively. It brushes aside the Ninth Circuit's Stachan decision by reducing it to the truism that one mustn't impose a penalty until one has conducted a trial. But since that truism is obviously not the point of Stachan, the attempted distinction cannot survive a reading of the Ninth Circuit's opinion.

Petitioners, not having been expelled or suspended from membership, remain "members" of Local 10 within the definition in §3(o) of the LMRDA, 29 U.S.C. §402(o). As such they are entitled to the rights guaranteed to "[e]very member" by §101(a)(1). Compare: Parish v. Legion, 450 F.2d 821, 824 (9th Cir. 1971); Hughes v. Local No. 11, 287 F.2d 810, 819 (3rd Cir. 1961), cert. den. 368 U.S. 829 (1961). The "suspension" infringes those rights. The conflict between the decision below and that of the Ninth Circuit in Stachan is fundamental to judicial interpretation of the LMRDA. It should be resolved by this Court.

II

> The decision below holds that the due process requirements of §101(a)(5) do not include the right of an accused to be notified that a hearing will be a trial of the charges against him.

The "Decision" of the GEB's Executive Committee, announcing the March 23, 1977 hearing before a "Special Appeal

Committee, and the letter forwarding a copy to petitioners, repeatedly described the hearing as a hearing on their appeal from the January 29, 1976 decision of Local 10's Trial Committee (see: App. 76a). So did the letter of February 28, 1977, from the Secretary of the Appeal Committee to petitioners (App. 68a-69a).

In their letter of March 14, 1977, petitioners stated that they regarded it as an appeal hearing and "made clear their position that they had, by their previous appearance before the GEB Appeal Committee in April 1976, exhausted their intra-union appellate remedies as far as such pursuit was required as a precondition to suit in federal court"; District Court Opinion, App. 77a. "Accordingly," Judge Motley noted, "[the petitioners] indicated that they would not attend the hearing.

Though thus put on notice that their reason for not attending was, precisely,

the appellate nature of the hearing, the Appeal Committee's Secretary replied by reassuring them that the hearing would be only on their appeal. See: App. 77a.

Judge Motley further found that "[i]t is only in the letter to plaintiffs of April 11, 1977 that the Secretary of the Special Appeal Committee first refers to the then-completed hearing as a de novo trial" (App. 77a-78a).

Nevertheless, the Second Circuit, reversing the District Court on this issue, holds that petitioners had "[a]mple notice" that the hearing was to be "a new trial." It apparently bases that view on the words, "de novo"[3] and on the promise of "due process rights prviously denied" (App. 30a).

The basis for reversal is itself refuted by the District Court Opinion. In it, Judge Motley noted (App. 79a) that "it

[3] Those words did not indicate an original trial, since ILGWU appeal hearings were normally conducted "de novo." See fn. 23, at App. 77a.

made a considerable difference whether [petitioners] were being notified of a trial or an appeal." For, as she observed (App. 78a),

> "... this court had previously enjoined both the Local and the I.L.G.W.U. from giving any force or effect to the January 1976 decision of the Local 10 Trial Committee. Therefore, plaintiffs would have been justified in taking the position that they had no obligation attend any appeal hearing[3a], which would, arguably, have been in violation of this court's order. And any affirmative decision taken in their absence arguably would have been of no legal force or effect ....."

At common law, the right of an accused union member to be notified that a scheduled hearing is to be a trial of the charges against him (and not some other kind of hearing) is a basic requirement of due process as applied to union proceedings; cf. Corregan v. Hay, 94 App. Div.

3a Nor were members required to attend appeal hearings generally. They could rest on their written appeals -- as petitioners did on their second appeal. See p. 11, fn. *, supra.

71, 87 N.Y.Supp. 956 (4th Dept., N.Y., 1904). Such right is plainly incorporated, as well, within the notice and fair hearing requirements of §101(a)(5) of the LMRDA.

The Court of Appeals added, as a secondary argument, that petitioners "had ample opportunity to clarify the matter" (App. 30a). It overlooked the fact that petitioners had sought to do that by their letter of March 14, 1977 -- only to be reassured that the hearing was to be "on [their] appeal" only. More generally, this secondary argument is answered by Judge Motley's observation (App. 79a) that "the law seems clear, however, that the onus is upon the union to provide adequate notice and there is no duty upon the accused to make such an inquiry."

The right to be notified that a hearing is to be a trial is fundamental. The issue should be settled by this Court.

III

The decision below grievously attenuates the guarantee of "a full and fair hearing."

Despite the unusual reliance that the Court below places, in its decision, upon the due process requirements of §101(a)(5) for the protection of §101(a)(1) rights (App. 17a, 18a; see pp. 17-18, supra), its its decision undercuts those requirements.

It holds that the fourth disciplinary hearing, in which ILGWU Vice Presidents sat as judges on the charges brought by their fellow Vice President, Dolgen, against the three members, "must be viewed as a full and fair hearing within the meaning of the Act." (App. 31a). Yet the characteristics of that hearing were such, as the Court had noted in discussing the second trial (App. 27a), as to make the trial atmosphere "hardly conducive to impartial resolution of the issues" and to present "the obvious danger that [the decision makers] will not be fair and impartial."

The holding below thus presents the issue whether Congress's guarantee to accused union members of "a full and fair hearing" requires a trial atmosphere at least minimally conducive to impartiality, and a trial body whose members do not present an unreasonable danger of non-impartiality.

The characteristics of the fourth disciplinary hearing that bear upon the analysis by the Court below of this issue were as follows:

(a) the trial body was composed of ILGWU Vice Presidents, members (along with Dolgen) of ILGWU's GEB;

(b) the charges arose out of internal political differences;

(c) they were brought by Dolgen, a fellow ILGWU Vice President and Local Manager

(d) against members who were critical of the officers' policies; and

(e) the decision makers were not

trained (as judges are) in professional commitment to detached and disinterested appraisal of the evidence.

As the Court below suggested, such "inadequacies" as these, in disciplinary procedures dealing with "politically charged accusations" (see: App. 27a, fn. 21) create an unreasonably strong probability of non-impartiality. App. 27a. Petitioners submit that they make out a prima facie case of non-impartiality.

Nor was that prima facie case rebutted. There is no substantial and credible evidence to show that the unfair trial atmosphere was in some way overcome, or that the "obvious danger" of non-impartiality was mitigated, or that the trial body was in fact impartial.

That Congress, when it enacted §101(a)(5), sought to protect against that very danger and atmosphere of non-impartiality is clear from the legislative history. Senator McClellan, introducing the original version of what is

now §101(a)(5), remarked that many of the disciplinary charges brought against rank and file members were, in his opinion, "trumped up charges." II Legislative History of the Labor-Management Reporting and Disclosure Act, supra, 1103(3). He went on to say:

> "Those accused are helpless. They would have to go before whom? They would have to go before the executive board or the executive committee. That board or committee would be appointed by whom? It would be appointed by the ones who make the charges."

By providing that no member shall be disciplined unless he has been afforded "a full and fair hearing," Congress plainly meant to require a trial in an atmosphere conducive to impartiality, and not presenting an obvious danger of non-impartiality. As the Court below concedes (App. 27a), a trial in which union officials sit in judgment on charges arising out of internal political differences, brought by a fellow official against members critical of their policies, does not meet that test. Petitioners submit

that the Congressional intent is defeated by a holding that such a trial "must be viewed as a 'full and fair hearing' within the meaning of the Act."

IV

Union members disciplined in violation of the LMRDA are entitled at the least to nominal damages.

The Court below reversed and set aside all damage awards on the LMRDA claims. It thus denied petitioners even nominal damages for their unlawful discipline.

It seems plain that plaintiffs are entitled at the least to nominal damages for (a) the unlawful discipline itself and (b) Dolgen's malicious manipulation of the disciplinary trials and resulting punishment. In Carey v. Piphus, 435 U.S. 247, 266 (1977), this Court laid it down that

> "... we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury."

By awarding nominal damages, "the law recog-

nizes the importance to organized society that those rights be scrupulously observed." Ibid. And see: McCormick, Damages, §22, pp. 90-91 (1935).[4]

By its denial of nominal damages to union members disciplined in violation of §101(a)(5), the Court below has decided an important federal question in a way in conflict with the principles laid down in Carey, supra. The conflict should be resolved by this Court.

V

Union members disciplined in violation of the LMRDA are entitled to damages for such mental and emotional anguish as the jury many infer they suffered by reason of the unlawful discipline.

The decision below, dismissing all damage awards on the unlawful discipline claims, is in conflict with the Ninth Cir-

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[4] Such an award may be -- as it is here -- materially significant as well, for its effect on the plaintiff's entitlement to punitive damages. In this case, a nominal damage award would overcome the reasoning of the Court below in reversing the punitive damage award (App. 33a; and see p. 35, infra).

cuit's decision in Addison v. Grand Lodge of the Int'l Ass'n of Machinists, 318 F.2d 504 (1963) and with this Court's teaching in Carey v. Piphus, supra.

In Carey, 435 U.S. at 264-65, this Court ruled that

> "the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by deprivation of another."

Specifically, it drew a distinction between suits limited to denial of procedural rights and those for denial of substantive rights.

Where there is no actionable infringement of substantive rights, and plaintiff claims only deprivation of a procedural right, his damages are limited to injury shown by actual evidence to have resulted from the denial of the procedural right. 435 U.S. at 263.

But when a substantive right affecting interests of personality is denied, humiliation may be inferred, and "compensatory damages may be awarded for the humiliation

suffered by plaintiffs, whether inferred from the circumstances or established by testimony"; Seaton v. Sky Realty Co., 491 F.2d 634, 636, 637-38 (7th Cir. 1974); and see: Carey v. Piphus, supra, 435 U.S. at 264, fns. 21 and 22.

The same extends to breaches of contract affecting interests of personality; cf. McCormick, Damages, supra, §145, pp. 593-94. Among such breaches of contract, at common law, is wrongful expulsion from a labor union. Thus, expulsion without the procedures required by the union's constitution constitutes a breach and the expelled member is entitled, at common law, to damages for mental and emotional distress attributable to the expulsion; cf. International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 618-19 (1958).

These principles apply a fortiori, where the discipline is in violation of federal statute and results in denial of substantive

statutory rights affecting interests of personality.

Such substantive liability is obvious in the case of Dolgen, since the jury upheld plaintiffs' claims under §609 of the LMRDA (p. 6, supra), finding (Sp. Q. #4; App. 118a) that Dolgen had

> "... dominated and manipulated the [union] trials and their resultant punishment in order to get revenge against plaintiffs,"

and that he did so (Sp. Q. #16, App. 122a) "in reckless or wanton indifference to plaintiffs' rights."

But it is clear, also in the case of Local 10, since §101(a)(5) -- instead of merely guaranteeing procedural rights -- makes union discipline unlawful and actionable unless the disciplined member has been afforded the rights there specified.[5]

5 In choosing this language, Congress rejected a provision in the Elliott bill, H.R. 8342, that would merely have guaranteed to "any member ... who is /disciplined/" that he "shall be afforded" a fair hearing on written charges. I Legis. Hist. of the LMRDA, supra, 699. The House rejected the Elliott bill, despite the fact that it had been reported favorably by the Committee on Education and Labor, and adopted instead the Landrum-Griffin bill, H.R. 840, which contained the present § 101(a)(5). Ibid, 631.

Since that condition was not met here, the plaintiffs are entitled to sue, under §102 of the LMRDA, for infringement of any substantive Title I rights infringed by the unlawful discipline.

In Addison, supra, 318 F.2d at 508, the Ninth Circuit so held, reasoning that if a member is expelled without a fair hearing his expulsion is wrongful; and

> "If the expulsion of appellant is wrongful, he has remained a member in good standing of the Union and has unlawfully been deprived of some of the rights afforded to him by the 'Act,' and is entitled to some relief."

The rights guaranteed to members by Title I were deemed by Congress "vital to the independence of the membership and the effective and fair operation of the union as the representative of the membership"; Hall v. Cole, supra, 412 U.S. at 7. To

protect those rights, §102 was "cast as a broad mandate to the courts to fashion 'appropriate' relief." Ibid, at 11.

By reversing the LMRDA damage claims, however, the Second Circuit has denied union members, who were unlawfully disciplined and deprived of substantive Title I rights, any relief. It reasons that only procedural rights were infringed (App. 31a-32a) -- despite the facts that the discipline barred the members from membership meetings; and that Dolgen acted "to get revenge against [petitioners]" for their exercise of substantive Title I rights.

Because substantive rights were infringed, plaintiffs are entitled to damages for such emotional anguish as the jury infers resulted from such denial. The denial of such damages below is in direct and serious conflict with the Ninth Circuit's decision in Addison, supra, and with this Court's in Carey v. Piphus, supra.

VI

The reversal of the punitive damage awards is in conflict with the decisions of other circuits and/or with the principles established under Rule 51

The Court below reversed all the LMRDA damage awards, both compensatory and punitive. App. 33a. 35a. It gave no reason for its reversal of the punitive damage awards, however, save for one cryptic sentence (App. 33a):

> "Nor did appellees except to Judge Motley's instruction that punitive damages cannot be awarded in the absence of compensatory damages."

If, by reversing the punitive damage awards, the Court below intended to rule that punitive damages may not be awarded in a suit for discipline in violation of §101-(a)(5) of LMRDA unless compensatory damages are awarded also, its decision is in conflict with decisions on precisely that issue by the Fifth and Ninth Circuits: International Brotherhood of Boilermakers v. Braswell, 388 F.2d 193, 199 (5th Cir. 1968); cert. den. 391 U.S. 935; Bise v. Electrical

Workers, ___ F.2d ___, ___, 102 LRRM 2619, 2623 (9th Cir. 1979).

On the other hand if, acknowledging that in such a suit punitive damages may be awarded in the absence of compensatory damages, the Court below intended to rule that it was bound by the unobjected-to though erroneous instruction to the contrary, to such an extent that, having reversed the compensatory damage awards it must go further and reverse the punitive damage awards also, then it has given a radically new, and dangerous, construction to Rule 51, Fed.R.Civ.P.

That rule provides that a party may not assign as error an instruction he has not objected to. It is a rule of procedure only; not of substantive law; cf. Stewart v. Ford Motor Co. 553 F.2d 130, 139-40, fn. 11 (D.C. Cir. 1977). It bars assignment of the instruction as error -- but it does not in any other manner make the unobjected-to instruction the law of the case; cf. 9 Wright

& Miller, Federal Practice and Procedure, Civil: §2558, p. 671. It is thus a "procedural hurdle" only; Williams v. City of New York, 508 F.2d 356, 362 (2d Cir. 1974); it does not authorize reversal of a proper jury award because, after reversal of another part of the judgment, the award is no longer consistent with the erroneous instruction. Compare: Messenger v. Anderson, 225 U.S. 436, 444 (1911).

To the suggestion that jury findings be reversed because they were inconsistent with an erroneous but unobjected-to instruction, a different panel of the Second Circuit replied, through Judge Charles E. Clark, in Lyons v. Empressa Hondurena de Vapores, S.A., 273 F.2d 317, 319 (1959), that

> "While this contention is an ingenious one, we deem its mere statement a sufficient demonstration of its fallacy."

The decision below bears the same fallacy. It forgets that Rule 51, like other rules of practice and procedure, was devised to pro-

mote the ends of justice, not to defeat them; compare: Hormel v. Helvering, 312 U.S. 552, 556 (1941). Because the decision below misconstrues Rule 51 to defeat the ends of justice, it calls for this Court's review.

CONCLUSION

For all the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

BURTON H. HALL
HALL, CLIFTON & SCHWARTZ
Attorneys for Petitioners
401 Broadway
New York, N.Y., 10013

(212) 431-9114

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 344, 522, 523—August Term, 1978.

(Argued January 17, 1979 Decided July 17, 1979.)

Docket Nos. 78-7335, 78-7336, 78-7337

THOMAS ROSARIO, OVIDIO VEGA and RAY CABEL,

Plaintiffs-Appellees,

—against—

AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, I.L.G.W.U., ABE DOLGEN, Individually and as Manager of AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, I.L.G.W.U.,

Defendant-Appellants,

—and—

THE CITY OF NEW YORK,

Defendant-Appellee.

THOMAS ROSARIO, OVIDIO VEGA and RAY CABEL,

Plaintiffs-Appellees,

—against—

AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, I.L.G.W.U., and INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,

Defendants-Appellants.

Before:

MOORE, MANSFIELD, *Circuit Judges,* and WYATT,* *District Judge.*

Appeal by defendants from a judgment of the District Court for the Southern District of New York, Constance Baker Motley, *Judge,* in an action by union members against their local and international unions and against one union official seeking injunctive and monetary relief for violations of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401, *et seq.*, and of state tort law and an award of attorney's fees.

The injunctive order barring the union appellants from following certain disciplinary procedures is affirmed in part and reversed in part.

The award of damages under the federal law claims is reversed, and the award of attorney's fees is affirmed to the extent consistent with the partial affirmance of the injunctive order.

* Of the United States District Court for the Southern District of New York, sitting by designation.

The award of damages on state law claims is affirmed.

SIMON H. RIFKIN, Esq., New York, NY (Jay Topkis, Esq., Richard M. Zuckerman, Esq., Paul, Weiss, Rifkin, Wharton & Garrison, New York, NY, of counsel), *for Defendant-Appellant Amalgamated Ladies' Garment Cutters' Union, Local 10, I.L.G.W.U.*

STEPHEN C. VLADECK, Esq., New York, NY (Judith P. Broach, Lawrence M. Sapadin, Paul L. Shapiro, New York, NY, on the brief), *for Defendant-Appellant Abe Dolgen, individually.*

MAX ZIMNY, Esq., New York, NY (Ann F. Hoffman, Esq., New York, NY, of counsel), *for Defendant-Appellant International Ladies' Garment Workers' Union, AFL-CIO.*

BURTON H. HALL, Esq., New York, NY, *for Plaintiffs-Appellees.*

MANSFIELD, *Circuit Judge:*

Local 10 of the International Ladies' Garment Workers Union (ILGWU) and the ILGWU itself (both of which are sometimes collectively referred to herein as the "Union") are joined with Abe Dolgen, former Manager of Local 10, as defendants in two consolidated actions brought in the Southern District of New York by appellees, three members of Local 10,

under § 102 of the Labor Management Reporting and Disclosure Act (LMRDA, the Landrum-Griffin Act, or the Act), 29 U.S.C. § 412, seeking nullification of certain union disciplinary proceedings and damages for violations of procedural and substantive rights under § 101 of the Act, 29 U.S.C. § 411, and seeking damages under pendent state tort claims.[1] These three defendants appeal from an order and judgment entered by Judge Constance Baker Motley after a grant of partial summary judgment and a jury trial of the remaining issues, permanently enjoining Local 10 from following certain procedures in disciplining its members and awarding compensatory and punitive damages against Local 10 and Dolgen.

The actions arose out of an altercation between appellees and Dolgen on January 29, 1975, in Dolgen's Local 10 office and a series of ensuing disciplinary proceedings against appellees conducted by Local 10 and the International. Appellees claimed that Local 10 and the ILGWU deprived them of the full and fair hearing required by § 101(a)(5)(C), by (1) remanding the disciplinary charges for retrial before essentially the same tribunal that had previously found them guilty and by (2) denying appellees the right to tape-record the proceedings at their own expense when the union did not provide for a verbatim record.[2] Appellees also claimed that the sanction imposed—suspension of the right to attend membership

1 For purposes of this appeal we treat the two complaints as one.

2 In a separate decision, also issued today, we address the question of whether a union member has a right to tape-record his disciplinary proceeding when the union does provide for a verbatim transcription. *Feltington v. Moving Picture Machine Operators Union Local 306, post.*

meetings—violated § 101(a)(1), the "equal rights" provision of the Act. In addition, appellees Rosario and Vega, invoking the court's pendent jurisdiction, advanced claims against Dolgen and the City of New York for false arrest and against Dolgen for malicious prosecution.[3]

In a pretrial decision, reported at 441 F. Supp. 657, Judge Motley ruled that the challenged union trial procedures and sanction violated § 101. Accordingly she set aside the disciplinary conviction and permanently enjoined Local 10 and the ILGWU from committing such violations.[4] Appellees' remaining claims for compensatory and punitive damages were submitted to the jury in the form of special interrogatories. The jury found that appellees were injured by Local 10's violations of § 101 but that Local 10 had not disciplined appellees in retaliation for their political opposition to the Local's leadership. The jury further found that Dolgen had not contributed to the § 101 violations but had "acting under color of his authority as manager of the union, and not in his individual capacity as a complaining union member, dominated and manipulated the trial and their resultant punishment in order to get

3 Prior to trial appellees voluntarily discontinued their claims against the City of New York, whereupon these claims were dismissed. At the same time Judge Motley, asserting discretion to decline to exercise jurisdiction over pendent claims, dismissed without prejudice Dolgen's cross-claims against the City seeking contribution toward the false arrest claim.

4 Judge Motley dismissed the LMRDA claims against Dolgen, insofar as they sought relief for acts he unofficially committed, on the ground that that Act provides relief only against persons acting in an official capacity. See 441 F. Supp. at 675-76. Appellees have not cross-appealed this dismissal.

revenge against [appellees]." The jury also found Dolgen liable for false arrest and malicious prosecution.[5]

We affirm the judgment below insofar as it holds (1) that a union may not under § 101 allow a member of a union tribunal which had convicted a union member to participate as a member of the tribunal upon a retrial of the same charges and (2) that a union may not prevent an accused from recording disciplinary proceedings when the union itself does not provide a verbatim record. We also affirm the judgment against Dolgen for false arrest and malicious prosecution. We reverse the decision that a union may not as a disciplinary sanction suspend a member's right to attend membership meetings. We set aside the damage awards against Local 10 and Dolgen on the federal claims on the grounds they

5 The jury awarded damages as follows:

	Against Dolgen: *Compensatory*	*Punitive*
False Arrest		
Rosario	$1,000	$2,500
Vega	1,000	2,500
Malicious Prosecution:		
Rosario	2,500	0
Vega	1,500	0
Wrongful Discipline (LMRDA claim):		
Rosario	500	2,500
Vega	500	2,500
Cabel	500	2,500
	Against Local 10:	
Wrongful Discipline (LMRDA claim):		
Rosario	1,000	10,000
Vega	1,000	10,000
Cabel	1,000	10,000

Judge Motley ruled that appellees were entitled to recover from Local 10 attorney's fees in an amount that remains to be determined, attributable to prosecution of their claims for declaratory judgment on the § 101 claims.

were predicated in part on an erroneous legal theory and unsupported by sufficient evidence.

Since the tortuous background to this litigation is well described in Judge Motley's reported opinion, 441 F. Supp. at 661-70, we confine ourselves to facts essential to our opinion. Appellees had for several years prior to the events giving rise to this litigation been vocal critics of the management of Local 10 and in particular of Abe Dolgen, its manager.[6] On January 29, 1975, appellees met with Dolgen in his office to discuss employment in the cutting trades and alleged discrimination in job referrals by Local 10's business agents. A heated argument took place, following which Dolgen and five other officials of Local 10 who had entered Dolgen's office during the discussions jointly left the room and returned moments later with two police officers. In the meantime appellee Cabel had departed to attend to some personal business. One of the policemen advised Rosario that Dolgen wanted him and Vega to leave. Rosario, startled, attempted to explain the situation but his remonstrance was cut short when Dolgen insisted that Rosario and Vega be arrested, declaring that he would press charges, and demanded that Cabel be tracked down and arrested.[7] Meanwhile Dolgen's five fellow officials were allegedly lined across the doorway to his small office, preventing appellees from leaving voluntarily and intensifying the intimidating atmosphere.

6 Dolgen retired from his position with Local 10 on July 1, 1976, having served as Manager for eight years and in various capacities for a total of 37 years.

7 Evidently Cabel was never arrested.

Rosario and Vega were handcuffed and searched by the arresting officer and taken to the police station in a squad car in the custody of two other police officers who arrived on the scene. At the station the police made one and possibly two calls to Local 10's office and were told that charges would be pressed. Rosario and Vega were each given an "Appearance Ticket," an instrument issuable by a police officer in a non-felony case, directing each individual to appear in the local criminal court at a specified time for a specified charge. See N.Y. Crim. Pro. L. §§ 150.10, *et seq.* (McKinney). About two weeks later, Rosario and Vega appeared as directed in Criminal Court and, after spending several hours waiting as the case was repeatedly called, were told they could go home since the complainant had not appeared.

On February 10, 1975, the very day when Rosario and Vega appeared in court, Dolgen, "acting in his individual capacity," filed intraunion disciplinary charges with Local 10 against them and Cabel, accusing them in multiple counts of interference with union operations and of conduct unbecoming a union member, in violation of the ILGWU's constitution.[8]

On February 25, 1975, appellees were tried before the Executive Board of Local 10 sitting as a grievance committee, found guilty and sentenced to a one-year suspension of their right to participate in union membership meetings. They appealed this conviction to the Appeal Committee of the General Executive Board (GEB) of the ILGWU, claiming that Dolgen and some of his witnesses had participated in

8 The charges and the relevant constitutional provisions are set out at 441 F. Supp. at 661, n 2.

the deliberations of the trial body. The Appeal Committee, while declaring that this claim had not been established, nevertheless vacated the conviction to avoid any appearance of impropriety. Dolgen then promptly preferred identical new charges against appellees, which were heard on May 21, 1975 by the Local 10 Executive Board, several members of which had been on the Board when it heard the same charges in February. Again the Committee unanimously found appellees guilty as charged.

Appellees again appealed to the GEB's Appeal Committee, claiming that the tribunal was biased and that Dolgen had "maliciously" dominated the proceedings. They also protested the ruling of the trial body prohibiting them from tape-recording the proceedings and from examining the official minutes of the trial.[9] This time the Appeal Committee affirmed the conviction, ruling that the claim of bias or prejudice on the part of the second trial body was unsupported by evidence and could not be based simply on the fact that essentially the same group of individuals had decided the same charges before. The Appeal Committee also rejected appellees' other claims and approved the Trial Committee's ruling that an accused union member is not entitled to ex-

9 At both of the first two trials one of appellees brought a tape recorder, which he was told he could not use. However, Rosario covertly recorded the trial proceedings with another machine. Appellees contend that their surreptitious recording of the first trial reveals that the official minutes, read to them at the appeal, were inaccurate in significant respects. The minutes of the first trial were taken by Nat Klein, Secretary of Local 10's Executive Board; those of the second trial were taken by another member of the Board.

amine a copy of the trial minutes or tape-record the proceedings.[10]

At this juncture, appellees in September, 1975, filed suit in the federal court against appellants under LMRDA and state tort law. Shortly thereafter the GEB, *sua sponte,* reviewed the decision of the Appeal Committee and directed the Trial Committee to conduct a new trial under certain specified conditions, principally that the tribunal consist of rank-and-file union members having no previous involvement with the case and that the Committee designate a secretary to take minutes, which would be available to all parties.[11] The members of this trial committee were elected by an open hand vote at the next regularly scheduled membership meeting, held on November 24, 1975. Appellees later alleged in their federal action that Local 10 did not adequately notify the membership of this meeting, with the result that the attendance was unusually low and most of those present were firm supporters of the in-

10 Under the ILGWU constitution, the trial minutes are not shown to either the charging party or the defendant but are forwarded to the Appeal Committee if an appeal is taken and are read to the defendant at the appeal hearing, at which time he can point out alleged errors in the minutes.

Appellees did not appear at the appeal hearing following the second trial, but rested on written submissions. The Appeal Committee sustained the prohibition against use of a tape recorder on the ground that under the Union's constitution the minutes as prepared by the trial or appeal body represent the one and only official record of a disciplinary proceeding. The Committee took note of the susceptibility of tape recordings to falsification. See 441 F. Supp. at 663-64, nn. 5, 6.

11 Under art. 23, § 5 of the ILGWU constitution, the only appeal of right from a decision of the Appeal Committee is to the next triennial or special convention of the ILGWU, which for appellees meant waiting until May, 1977. However, the GEB may on its own motion review a decision of the Appeal Committee, and the GEB's decision is appealable to the convention.

cumbent management. Appellees also allege that the tribunal was hand-picked by Dolgen and his colleagues. Not surprisingly, appellants deny these allegations.

On December 18, 1975, the scheduled trial date, appellees, whose request for transcripts of the two previous trials for preparation purposes had been denied by the Trial Committee, appeared with their tape recorders in hand. The hearing was adjourned to January 8, 1976, when an impasse developed over use of the tape recorder. Appellees and their lay counsel returned on the new trial date, still insisting upon their right to use the tape recorder. The Trial Committee thereupon retired to an adjoining room and tried appellees *in absentia.*[12] By written decision dated January 29, 1976, the Trial Committee convicted appellees of the specifications of misconduct that were common to all three appellees and suspended their right to attend meetings, Rosario and Vega for 18 months and Cabel for one year. Appellees again appealed to the GEB, but the hearing of the appeal was adjourned *sine die* when appellees refused to desist from using their tape recorder.

At this point, July, 1976, appellees filed their second federal action with a complaint that in essence incorporated allegations concerning the third union trial into the federal claims asserted in the first action. In August 1976 Judge Motley granted appellees a preliminary injunction barring Local 10 from carrying out the punishment imposed by the third Trial Committee. Appellants took an appeal to this Court,

12 The parties dispute whether appellees were locked out of the room in which the Trial Committee conducted the hearing or whether they were free to enter *sans* the tape recorder.

which on November 9, 1976, affirmed from the bench the issuance of the injunction.

Following the issuance of the injunction, the battle returned to the union halls, where on December 14, 1976, the Executive Committee of the GEB, acting *sua sponte* in response to the federal court rulings, ordered that "the appeal from [the] charges [filed by Dolgen] shall be heard and determined by a Special Appeal Committee of the General Executive Board." The Executive Committee's "decision" specified that the Special Appeal Committee was to consist of five ILGWU vice-presidents and that "[t]he appeal from the Trial Committee's decision of January 29, 1976, [was to] be a hearing *de novo* by the Special Appeal Committee." The parties, moreover, were to be accorded the right to be represented by counsel, to present any relevant evidence, to cross-examine witnesses, and to make opening and closing statements; appellees were to be furnished with a copy of the minutes of all previous trial and appellate hearings, and the proceedings of the "*de novo* appeal" were to be transcribed by a certified shorthand reporter.[13]

Appellees responded to the Executive Committee's decision with a letter to the Committee denouncing the "*de novo* hearing" as a form of harassment contrived to retaliate against them for pursuing their rights in federal court. Having, in their opinion, exhausted their intraunion appellate remedies, appellees announced in their letter that they would not attend the hearing. The Special Appeal Committee replied with a reminder of the time and place of the "hearing *de novo* on [the] appeal" and with a reference to

13 This decision was distributed to appellees with a cover letter stating that the decision was "in connection with the appeal" taken by appellees.

Art. 22, § 4 of the ILGWU constitution, quoted in the letter, captioned "Failure to appear at trial," which provides that if an accused fails to appear for trial without good excuse, the trial body may proceed as if he were present.

No further communications occurred until the Special Appeal Committee on April 11, 1977, sent appellees a copy of the stenographic transcript of a hearing that had been held by it as announced on March 23, 1977, and a copy of the Statement and Decision of the Committee, which found appellees guilty of the common charges of misconduct and adopted the sanction imposed by the Third Trial Committee.[14] The cover letter, which called attention to appellees' right to appeal to the next convention of the ILGWU, scheduled for May, 1977, referred to the hearing held by the Special Appeal Committee as a "*de novo* trial." In reply Rosario wrote the Committee denying that it had authority under the ILGWU constitution to conduct a trial, asserting that it had authority only to hear appeals and that hearing an appeal from the Trial Committee's decision would be in contempt of the district court's preliminary injunction.

In May, 1977, appellees moved in the district court for an order holding the ILGWU in contempt of the September 20, 1976, injunction barring execution of the disciplinary sanction. This motion was denied by Judge Motley. Appellees then pursued their ultimate intraunion appellate remedy, filing an appeal to the Convention. Appellees asserted in the

14 The Special Appeal Committee did not consider the count preferred against Cabel alone, which had been dismissed by the third Trial Committee.

alternative that the ruling of the Special Appeal Committee, if an appeal, did not cure the defects in the trial procedure and, if a trial, was *ultra vires*. Appellees did not attend the hearing before the Appeal Committee of the Convention, despite concededly adequate notice. The Committee recommended affirmance of the conviction, and the Convention unanimously ratified this recommendation.

On November 14, 1977, Judge Motley filed her decision granting summary judgment awarding permanent injunctive relief against Local 10 and the ILGWU on the ground that they had violated appellees' rights by barring them from attending Union meetings, by denying them a full and fair hearing at the first two Union trials, by refusing to permit them to record the proceedings, and by permitting retrial of the same charges against them before the same tribunal. Judge Motley also dismissed the claims of § 101 violations against Dolgen on the ground that he had acted in a private, not in an official, capacity, and denied Local 10's motion to dismiss appellees' claims that the Union's disciplinary punishment violated 29 U.S.C. § 529. In April, 1978, the remaining claims, including those for compensatory and punitive damages for the denials of appellees' right to attend Union meetings and of a full and fair hearing of the charges against them, plus the false arrest and malicious prosecution claims against Dolgen, were tried before a jury, which answered special questions. This led to entry of the judgments, including a direction that reasonable attorney's fees be awarded, from which defendants appeal.

Discussion

I. Federal Law Claims

(a) *Whether a Union May Suspend a Member's Right to Attend Meetings*

We turn first to the question of whether the district court erred in holding that a union may not punish a member by suspending his right to attend membership meetings. The district court reasoned that such a "partial" suspension is not a form of discipline implicitly sanctioned by § 101(5) of the LMRDA, since appellees remained union "members" as defined in § 3(*o*) of the Act, 29 U.S.C. § 402(*o*), and were therefore entitled to the equal rights guaranteed to "members" by § 101(a)(1), including the right "to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings." In support of this literalistic interpretation of the statutory language the court suggested that the seemingly mild sanction of barring a member from attending meetings might be abused by union officials eager to silence dissidents without provoking mistrust of other union members or of a federal court, which might occur if more dramatic sanctions such as expulsion or suspension of membership status were employed.

We are unaware of any cases clearly addressing the issue. *Stachan v. Weber,* 535 F.2d 1202 (9th Cir. 1976), cited by the district court and relied upon by appellees, is of no help. There the court simply ruled that union members who had refused to salute the flag and recite the pledge of allegiance at the opening of union meetings could not be excluded, since

their conduct was protected under the free speech clause of § 101, 29 U.S.C. § 411(a)(2). Although the court's statement that the "exclusion would clearly violate the equal rights section of the Act," 535 F.2d at 1203, might conceivably be interpreted as prohibiting such a form of discipline, the more plausible interpretation is that the union could not exclude members from union meetings without first conducting a "full and fair" hearing on written charges brought under the union's constitution or by-laws. Other decisions cited by appellants for their position are likewise non-supportive. Indeed, in *Reyes v. Laborers' International Union, Local 16,* 464 F.2d 595 (10th Cir. 1972), *cert. denied,* 411 U.S. 915 (1973), the court stated that it was "not moved by appellant's argument that the suspension from attending meetings violated his rights as a Union member. Suspension is expressly recognized in 29 U.S.C. § 411(a)(5) as one of the disciplinary actions for which the procedural safeguards must be afforded." 464 F.2d at 597.

We are persuaded that a union has the power under the LMRDA to discipline a member by suspending his right to attend membership meetings provided, of course, that he has been properly found after a full and fair hearing to have violated a legitimate union rule. Subsection (a)(5) does not restrict the form of discipline a union may impose; it guards against abusive and unjust exercise of union authority by prohibiting a union from disciplining a member without first affording him certain procedural safeguards against unwarranted or inaccurate adjudication. See *NLRB v. Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 194 (1967); *Morrissey v. National Maritime Union,* 544 F.2d 19, 26 (2d Cir. 1976). As

the senator who introduced the LMRDA stated, its objective "is to protect a man from being arbitrarily disciplined without a fair hearing and without the right to protect his livelihood. That is what it amounts to." 105 Cong. Rec. 5811 (daily ed., April 22, 1959) (remarks of Sen. McClellan), reprinted in II NLRB *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* 1103 (hereinafter cited as *Legislative History).*

Nor does subsection 101(a)(1) of the LMRDA, the "equal rights" provision of that Act, support appellees' contention that a union member is absolutely entitled to exercise rights of membership, unrestricted by reasonable forms of discipline, since it expressly provides that the right to attend and participate in membership meetings is "subject to reasonable rules and regulations in [the union's] constitution and bylaws." Although this qualifying clause does not expressly address disciplinary sanctions and its primary purpose is to allow a union to adopt reasonable, uniform rules governing such matters as the exercise of the union franchise and parliamentary procedure, see H. Rep. 741, 86th Cong., 1st Sess. 29 (1959), reprinted in 1959 U.S. Code Cong. & Admin. News 2424, 2452, it does demonstrate that union membership does not confer an unqualified right to exercise rights of membership.

Nothing in the LMRDA, therefore, precludes a union from removing a disruptive member from a meeting without first expelling him from membership or suspending his membership. Extending this result to allow a union to deny a member admission to meetings for a reasonable period as punishment for a prior violation of a reasonable rule or regulation

aimed at preventing disruption of union business is compatible with both the language and intent of the statute. In neither event is the union acting in some arbitrary fashion to suppress dissent or to sacrifice democracy in the interest of efficiency. Moreover, common sense dictates that a union should have the option of imposing a sanction less drastic than complete suspension when a member disrupts the conduct of union meetings or business. In enacting Title I of the LMRDA, Congress aimed to curb the autocratic rule of some union leaders by assuring union members of equal rights to participate in union affairs and the rights to speech and assembly and by preventing suppression of these rights through abuse of the union's disciplinary powers. Congress did not, however, desire to outlaw union discipline, *Morrissey, supra,* 544 F.2d at 26. Its aim was to prevent improperly motivated and conducted disciplinary proceedings.[15]

Viewing the statute in light of this purpose, any reasonable disciplinary sanction imposed in conformity with § 101(a)(5) is consistent with § 101(a)(1). The suspension of a union member's right to attend meetings cannot imperil union democracy or oppress the union member when the union would be entitled to suspend the member from membership altogether, as appellees concede would be the case here if they had been properly convicted of the charged offense.

15 Under the partial suspension imposed in this case appellees continued to enjoy all the economic benefits of union membership (as well as the obligation to pay dues), such as participation in the union's health and pension plans. In addition, appellees retained the right to vote in union elections, to nominate candidates and to run for office, although these rights perhaps had little practical value to one barred from attending membership meetings.

The sinister theory that if union officials could resort to a narrowly-tailored discipline they would be more apt to use disciplinary machinery to suppress dissent than they would if they had to rely on the more drastic remedies of expulsion or total suspension is unpersuasive. A union member who believes he has been wrongfully disciplined may challenge the union's action under § 102 of the Act regardless of the severity of the sanction. No support is offered for the argument that partial suspension would arouse less suspicion on the part of members or of a reviewing court than would total suspension or expulsion. It may be that a literal reading of § 101 lends some support to the result reached by the district court. However, since "[t]he Bill of Rights that appears as Title I of the Act was hastily drafted and included without much debate," *Navarro v. Gannon,* 385 F.2d 512, 517 (2d Cir. 1967), *cert. denied,* 390 U.S. 989 (1968), we are more inclined to follow the practice of giving effect to the legislative purpose notwithstanding the literal wording of the statute. See, e.g., *Lynch v. Overholser,* 369 U.S. 705, 710 (1962); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.,* 274 F.2d 487, 489-90 (2d Cir. 1960).

(b) *The Right of an Accused Union Member to Record Union Disciplinary Proceedings Against Him*

We next turn to the question of whether a defendant in a union disciplinary proceeding has a right to record the proceeding at his own expense, electronically or stenographically, when the union does not do so. It is not disputed that at the first three union trials appellees were forbidden to use the tape

recorder they had brought with them. Nor does the ILGWU suggest that appellees would have been allowed to have a stenographic record made had they retained a stenographer or court reporter. Throughout the proceedings the trial officials adamantly opposed appellees' desire to have a verbatim record maintained, arguing that an ILGWU constitutional provision requiring a trial committee to appoint a secretary to take notes of disciplinary proceedings proscribed any record other than the secretary's hand-taken notes. Judge Motley's holding to the contrary is supported by decisions of two other district courts which have considered the question, *Pawlak v. Greenawalt,* 464 F. Supp. 1265, 1271 (M.D. Pa. 1979); *Kiepura v. Local 1091, USW,* 358 F. Supp. 987, 991-92 (N.D. Ill. 1973).[16]

Appellees argue that requiring a union to permit a member to record the disciplinary proceeding is inconsistent with the general legislative policy of limited judicial intervention in union self-government. see *Newman v. Local 1101, CWA,* 570 F.2d 439, 445-46 (2d Cir. 1978), *opinion following remand,* ____ F.2d ____, No. 78-7480 (2d Cir. April 25, 1979), and with Congress' decision to delete from the bill which later became the Landrum-Griffin Act a proposal that would have required unions to prepare a transcript of every disciplinary proceeding. However, the national policy against judicial interference in the internal affairs of unions is "subject to important exceptions in specific areas in which Congress has

16 In *Pawlak* the court found that the union's refusal to allow the accused to tape-record the proceedings was not a ground for setting aside the results of the disciplinary trial since there were no disputed issues of fact, the only issue being whether the union could punish a member for the conduct that had admittedly occurred.

found that the interests of individual members need special protection against the danger of overreaching by entrenched union leadership." *Rota v. Brotherhood of Railway, Airline & S.S. Clerks,* 489 F.2d 998, 1003 (7th Cir. 1973), *cert. denied,* 414 U.S. 1144 (1974); see *Wirtz v. Hotel, Motel & Club Employees Union, Local 6,* 391 U.S. 492, 496-97 (1968); *Sheldon v. O'Callaghan,* 497 F.2d 1276, 1281 (2d Cir.), *cert. denied,* 419 U.S. 1090 (1974); *Tincher v. Piasecki,* 520 F.2d 851, 854 (7th Cir. 1975). The union member's bill of rights generally, including its full and fair hearing requirement, is one such area. While federal courts surely do not exercise "supervisory powers" over union tribunals they have the duty to insure that unions satisfy Congress' mandate of fairness in union disciplinary proceedings. To paraphrase *Wirtz v. Local 153, Glass Bottle Blowers Ass'n,* 389 U.S. 463, 471 (1968), the freedom allowed unions to run their disciplinary proceedings was reserved for those proceedings which conform to the "due process" principles written into § 101(a)(5). See *Falcone v. Dantinne,* 420 F.2d 1157, 1164 (3d Cir. 1969).

The question of allowing a union member to tape-record his disciplinary proceeding, like the question of the composition of the trial body, does not raise merely a technical point of procedure, which is certainly within the union's discretion, or require us to review the sufficiency of the evidence or to interpret the union's constitution or by-laws. Compare *Internat. Bro. of Boilermakers v. Hardeman,* 401 U.S. 233, 242-46 (1971). It does not, therefore, represent an unwarranted intrusion upon an area which Congress reserved to the unions.

Nor would our ruling on the question of tape-recording be inconsistent with Congress' rejection of a

proposal that would have required unions to transcribe disciplinary proceedings. Early versions in the House and Senate of the union members' bill of rights contained a provision requiring that a verbatim record be made of the disciplinary proceeding. See H.R. 4473, § 101(a)(7)(xi), 86th Cong., 1st Sess. (1959), reprinted in I *Legislative History, supra,* at 179; S. 1137, § 101(7)(E), 86th Cong., 1st Sess. (1959), reprinted in *id.* at 270.[17] However, the provision was rejected as "cumbersome and unnecessary," since the bill provided for review of a disciplinary judgment by a federal court in a civil action brought by the aggrieved union member, which would decide whether "the rights of the union member [had] been protected. . . ." See 105 Cong. Rec. 6023 (daily ed., April 25, 1959) (remarks of Sen. Kuchel), reprinted in II *Legislative History, supra,* at 1232.[18] There is no suggestion that making of an accurate record for

17 The Senate bill provided that no member could be disciplined unless "afforded final review on a written transcript of the hearing, by an impartial person or persons. . . ." The House bill simply provided that a verbatim record of the proceeding should be made.

18 Senator Kuchel's explanation for amending the provision dealing with disciplinary proceedings is, in full:

"We believe, Mr. President, that language is clear and explicit, and provides the usual reasonable constitutional basis upon which charges might be brought. We believe further that the language in subdivision (6) of the amendment of the able Senator from Arkansas, upon which we voted the other night, did raise some rather vexing questions. For example, the McClellan amendment provided in part that there should be a final review on a written transcript of a hearing, by an impartial person or persons (i) agreed to by such organization and the accused, or (ii) designated by an independent arbitration or mediation association or board.

"We believe that is cumbersome and unnecessary language. Since we have provided not merely for a criminal penalty but, in addition, for a civil right on the part of the aggrieved member to go to court, we believe that the U.S. district court will be able to determine whether the rights of the union member have been protected and whether he has had constitutionally reasonable notice and a reasonable hearing, and whether the matter has been reasonably disposed of."

H.R. 4473 was never considered on the floor of the House. The provision on disciplinary proceedings found in subsequent bills introduced in the House was either identical or substantially similar to the Kuchel amendment.

review by the neutral arbiter in appropriate cases was to be discouraged. Moreover, Congress' rejection of the proposal hardly resolves the issue before us, which is whether the *accused* may make a verbatim recording, not whether the *union* has an obligation to do so.[19]

Appellees' argument that permitting a union member to tape-record disciplinary proceedings against him would impose excessive financial burdens on unions is hardly persuasive, since it is the union member, not the union, who would assume the obligation of making the recording. Nor is there any force to the contention that the union would be required to make its own recording in order to protect against falsification of tapes by the accused. In most run-of-the-mill cases—those not involving disputes over union management—it is logical and likely that the member would accept the union's record, absent proof of a motive to falsify. In other cases there would be no factual dispute, in which event the union would have no occasion to worry about falsification of the record even if the accused were allowed to record the proceedings. See *Pawlak, supra,* 464 F. Supp. at 1271.

The notion that union members would possess the expertise or equipment needed to distort or falsify tapes, much less to prevent ready detection of such

19 The comments, cited by appellants, of members of Congress criticizing the McClellan proposal address themselves to the intrusive review of disciplinary findings by a neutral arbiter rather than to the alleged burden of making a transcript.

conduct, appears rather far-fetched. Where tapes are unreliable, either because of the possibility of distortion or of unintelligibility, the union would be justified in disregarding them or giving them little weight. Where falsification is suspected, the union could easily require the accused member to place the tape under seal in the custody of a neutral body. The cost to the union of making its own recording in those few cases where it could not otherwise protect itself by one of the foregoing methods hardly approaches excessiveness.

Nor is there any merit in the Union's argument that taping of disciplinary proceedings by the accused would defeat Congress' desire to keep such proceedings informal. The operation of a tape-recorder is no more intrusive than the ILGWU's practice of requiring the Secretary of the Trial Committee[20] to keep notes of the trial proceeding, which the accused member is permitted to see and challenge only at the hearing on appeal. As a practical matter, a claim that official minutes made from scribbled handwritten notes are inaccurate would normally be entitled to much greater weight if based on a clear tape-recording of the proceedings than it would otherwise be, since the tape would usually be more accurate and complete than the notes. Whether or not the Union would be forced into matching the recording procedure adopted by the accused, cf. *Matthews v. Eldridge,* 424 U.S. 319, 334-35 (1976), the latter should not be deprived of an accurate record if he wants and is willing to obtain it at his own expense.

The suggestion that the tape-recording would impair union disciplinary proceedings borders on the

20 At the first trial minutes were taken by Nat Klein, Secretary of Local 10's Executive Board. At the two subsequent trials notes were taken by someone apparently designated *ad hoc* to serve as secretary for the Trial Committee.

frivolous. It is not uncommon today to tape-record proceedings of many different types (including all arguments of this court) without any intrusion or fanfare. The Union's contention that members would be reluctant to testify if the proceedings were tape-recorded not only implies that the witnesses would be reluctant to tell the truth but sheds doubt on the Union's own hearings. It also ignores the established practice of recording (either by stenotype or tape) testimony given in most judicial proceedings.

Appellants' further argument—that disciplinary proceedings should be treated like collective bargaining sessions or grievance meetings, which are usually not recorded— overlooks the significant difference in the nature of the two types of proceedings. Because negotiation of contract terms and grievances requires each party to compromise some or all of its interests in order to achieve a settlement best for the group as a whole, negotiators realize that the bargaining process could easily be stymied if each of the multiple, heterogeneous constituencies they represent are apprised of the details of the process. Experience teaches that labor contracts, like international treaties, cannot be openly arrived at. See *St. Louis Typographical Union No. 8, ITU,* 149 N.L.R.B. No. 71 at 750, 754 (1964) (Fanning and Brown, concurring). Union disciplinary proceedings, in contrast, are comparable in several important respects to a criminal trial, where credibility is crucial and secrecy is utterly foreign to our concepts of fairness. As in criminal trials, witnesses in union disciplinary proceedings are more likely to testify truthfully and union boards more likely to conduct themselves properly if they know that an accurate record of their testimony can be scrutinized by others than if the sole record consists of sketchy notes made by a

union official sympathetic to the union management. For all of these reasons we conclude that a union should allow an accused to record a disciplinary proceeding against him when the union does not.

(c) *Retrial of a Union Member on the Same Charges Before the Same Union Tribunal*

We turn next to appellants' challenge to Judge Motley's ruling that a union cannot consistently with the full and fair hearing requirement of § 101(a)(5) try a union member before a panel which includes one or more individuals who have previously heard the identical charges and adjudged the accused to be guilty.

It cannot be denied that in a literal sense the members of the second tribunal, having found the accused guilty of the identical charges, have "prejudged" his guilt. However, appellants point out that a *per se* rule precluding such a retrial by the same body would impose on union disciplinary tribunals a higher standard of due process than courts have imposed upon themselves or upon administrative agencies, to which cases are sometimes remanded for new fact-finding by the same decision-maker after initial findings have been set aside. This argument disregards the fact that criminal charges, which are analogous to union disciplinary charges, are not upon remand tried to the same jury. It also fails to take into account the markedly different safeguards inherent in judicial and administrative adjudication, on the one hand, as distinguished from intraunion adjudication, on the other—a distinction we recognized in *Salzhandler v. Caputo,* 316 F.2d 445, 450 (2d Cir.), *cert. denied,* 375 U.S. 946 (1963).[21] The former

21 We, of course, do not suggest that union members are immune from intraunion prosecution for disrupting union meetings or trespassing at union offices, even though they may be immune from internal prosecution for defaming a union official. See *Salzhandler, supra.* We cite *Salzhandler* for its recognition of inadequacies of most intraunion disciplinary procedures in dealing with politically charged accusations.

are governed by rules of procedure and of evidence and are subject to a review designed to insure that only findings which are supported by substantial evidence will be upheld. On the other hand, union disciplinary proceedings, subject to the strictures of § 101(a)(5), are governed by a far less formal regimen and, except in extreme cases, are not reviewed in the federal courts for the sufficiency of the evidence.

The most compelling distinction, however, is that the judicial and administrative processes insist with much greater rigor than does intraunion disciplinary process upon the detachment of the adjudicators from the prosecutors. When union officials or members sympathetic to their continued tenure and interest in maintaining the status quo sit in judgment upon charges arising out of internal political differences, brought by a fellow official against a member who is critical of their policies, the atmosphere is hardly conducive to impartial resolution of the issues. See *Salzhandler, supra,* 316 F.2d at 450. If, in addition, the decision makers are laymen who (unlike a judge) have not been trained in professional commitment to an exacting, detached and disinterested appraisal of the evidence, there is the obvious danger that they will not be fair and impartial. This danger is compounded when the officials have previously adjudicated the charges. The risk is more than § 101(a)(5)(C) will tolerate, particularly in light of the ease with which a union can draw upon others not previously connected with the case in order to assemble a tribunal. Accordingly, we affirm the district court's decision that disciplinary charges cannot be heard upon remand for a new trial before those who

previously heard the charges. See in accord *Cefalo v. Moffett,* 78 L.R.R.M. 2112 (D.D.C. 1971).

The decisions in *Falcone v. Dantinne,* 420 F.2d 1157 (3rd Cir. 1969), and *Tincher v. Piasecki,* 520 F.2d 851 (7th Cir. 1975), relied upon by appellants (and by the district court in *Feltington v. Motion Picture Machine Operators Union Local 306,* 97 L.R.R.M. 2517 (S.D.N.Y. 1977), *further opinion,* 97 L.R.R.M. 2522 (1978), which we today reverse) are not inconsistent with our decision in this case. In *Falcone* the three union officials constituting the trial body had participated in an informal hearing authorized by the union's constitution for the purpose of trying to settle the charges against the accused union member. When this failed the accused was tried and convicted. Upon an appeal by the accused from a dismissal of his action under § 102 the Third Circuit, reversing the district court, held that because one of the officials was biased against the accused, as was evidenced by his statements at the informal settlement hearing, the accused did not receive the full and fair hearing guaranteed by § 101(a)(5) of the Act, and suggested that upon remand a wholly new trial body should be constituted for any retrial. See 420 F.2d at 1163, n.8. Although the majority opinion (specifically excepted to by one member of the panel) states that it was not inherently improper for a union official who participated in the settlement discussion to sit on the Trial Body, 420 F.2d at 1160-61, the informal settlement session, unlike the earlier trials in the present case, did not necessitate any fact-finding by the officials. Thus there is strong reason to believe that the *Falcone* court, faced with the facts before us, would agree with our conclusion.

Appellants' reliance on *Tincher* is far-fetched. There the court invalidated a union disciplinary pro-

ceeding on the ground that the tribunal had considered a report which it had prepared after convicting the accused at a prior trial, the result of which had been set aside because the accused had received inadequate notice of the charges against him. In a footnote the court mentioned that because the trial body had considered evidence and its conclusion from the first trial, the result of the second trial must be set aside even if it were "assum[ed] *arguendo* that it was not improper for the same trial committee to hear [the second trial]," citing footnote 8 in *Falcone,* which had suggested that upon retrial it would be improper for any members of the prior trial body or even for union officers present at the earlier trial to serve on the newly constituted trial body, 520 F.2d at 856, n.7. Far from indicating a rejection by the Seventh Circuit of a *per se* rule, the reasoning of the court in *Tincher* is tantamount to adoption of such a rule.

(d) *The Adequacy of the Fourth Disciplinary Proceeding*

Appellants contend that, even assuming appellees' rights to a full and fair hearing were for the foregoing reasons denied at the first three disciplinary proceedings, the deficiencies were cured by the "*de novo* appeal" held on March 23, 1977. This contention was rejected by Judge Motley, who reasoned that appellees were entitled to rely on her previously issued injunction barring Local 10 and the ILGWU from giving any force or effect to the January, 1976, decision of the Local 10 Trial Committee as barring the conduct of further intraunion review or reconsideration of the Trial Committee's decision. Although

Judge Motley declined to hold the ILGWU in contempt of her injunction for holding the hearing before the Special Appeal Committee, she found that the Union had inadequately disclosed its intention to hold a new trial, so that appellees were entitled to ignore the summons. 441 F. Supp. at 672-73. We disagree.

Appellees had ample notice that the proceeding to be conducted by the Special Appeal Committee of the ILGWU's GEB would be a new trial and not merely a review of the results of the previous trial. The decision of the GEB directing that the proceeding take place, which was distributed to appellees well in advance of the hearing date, stipulated that the Committee would conduct a hearing *"de novo,"* with the parties entitled to be present and represented by counsel, to present documentary and testimonial evidence, to cross-examine witnesses and make opening and closing statements. Although GEB referred to the Board's action as one in connection with appellees' "appeal" and described the proceeding as "the hearing *de novo* on appeal" the substance of the message was clear: appellees were being offered a trial with all of the due process rights previously denied. If there was any doubt about the nature of the new proceeding, appellees had ample opportunity to clarify the matter. Instead they chose to boycott the proceeding. While their doubts about the Union's sincerity may be understandable, their failure to respond, either by accepting the offer or by asking the court's assistance to insure that a genuine full and fair trial *ab initio* would be held, is not.

Despite appellees' suspicions, there is no evidence that the Board's purpose was other than to comply

with the district court's injunction. Nevertheless, although the fourth disciplinary hearing must be viewed as a full and fair hearing within the meaning of the Act, it does not necessarily wipe out any harm caused to appellees by the Union's denial of fair hearings in their cases for over a period of almost two years. Nor is there any reason to believe that, absent injunctive relief, the defendants, who granted the *de novo* hearing in an obvious effort to mitigate the effect of the district court's decision, will not in the future resume the foregoing procedures in violation of the rights of appellees or other union members. We must also consider whether appellees suffered any damages as a result of the Union's earlier violations of their rights.

(e) *Damages*

(1) *Local 10 and ILGWU*

A union member who has been disciplined in violation of § 101 may recover damages for stigmatization, loss of earnings or similar harm caused by the wrongful conviction, see, e.g., *Bradford v. Textile Workers, Local 1093,* 563 F.2d 1138, 1144 (4th Cir. 1977); *Internat. Bro. of Boilermakers v. Braswell,* 388 F.2d 193, 199 (9th Cir. 1968); *Simmons v. Avisco, Local 713, Textile Workers Union,* 350 F.2d 1012, 1018 (4th Cir. 1965), and if the charges were prosecuted in bad faith or for an improper motive such as retaliation, for harm attributable to the prosecution itself, even if the member was acquitted or his conviction was reversed on appeal within the union or to a court. Although a question may exist as to whether damages are recoverable for mental or

emotional distress attributable to denial of due process in the absence of some other form of harm, see *Carey v. Piphus,* 435 U.S. 247, 263-64 (1978), we need not, for reasons indicated below, decide that issue in this case.

In the present case the jury awarded damages against Local 10 for mental distress attributable (without differentiation) to imposition of a sanction erroneously found by the district court to have been unlawful (suspension from attendance at union meetings) and to retrials before the same union tribunal.[22] The jury's assessment of these damages (compensatory and punitive) must be reversed because it is predicated upon the erroneous theory that partial suspension was an improper disciplinary sanction. See *Morrissey, supra,* 544 F.2d at 26-27. Indeed, since the jury found that the Union's prosecution of appellees was not in retaliation for their dissident political views, Local 10 presumably had a proper motive for bringing the charges to trial and there is no indication that appellees' distress was caused by lack of procedural due process. Although intangible

22 Judge Motley ruled prior to trial that appellees could not recover damages resulting from the wrongful denial of the right to record the proceedings because there was no preceding giving Local 10 fair notice of this right.

The special interrogatory posed to the jury on the claim for damages against Local 10 for the LMRDA violations was phrased as follows: "If you answered Yes to Question 5, finding Local 10 liable to the plaintiffs because of the violations of federal law which the court found had occurred in connection with the second trial and because of the illegal suspension from attending union meetings, what amount do you award plaintiffs for the harm they suffered against Local 10?" The jury here was not asked whether appellees were injured by the conviction and exclusion from membership meetings, and the jury explicitly found that Local 10 did not prosecute appellees for purposes of retaliation.

damages, such as mental distress, are not susceptible to exacting proof, a plaintiff must offer some evidence that the reputed injury was causally connected to the defendant's wrongdoing. Appellees failed to meet this burden. Nor did appellees except to Judge Motley's instruction that punitive damages cannot be awarded in the absence of compensatory damages. For these reasons the jury's assessment of damages against Local 10 must be set aside.

The district court's determination that attorney's fees may be awarded against Local 10 in favor of appellees' counsel stands on a different footing. Such an award is within the court's traditional equity power where the plaintiff confers a substantial benefit on the union's general membership, since "by vindicating his own right, the successful litigant dispels the 'chill' cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial 'not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs.'" *Hall v. Cole,* 412 U.S. 1, 8 (1973). Most of the cases in which a plaintiff was awarded attorney's fees under the *Hall* common benefit theory have involved suits seeking redress for union action infringing upon a member's political rights. See, e.g., *Bunz v. Moving Picture Mach. Operators' Protective Union Local 224,* 567 F.2d 1117 (D.C. Cir. 1977); *Ross v. IBEW,* 544 F.2d 1022 (9th Cir. 1976); *McDonald v. Oliver,* 525 F.2d 1217 (5th Cir.), *cert. denied,* 429 U.S. 817 (1976).

In the present case, whether or not appellees' suit served as an antidote to autocracy, it did confer a benefit upon the general membership by insuring

that other Union members charged with violations of the Union's rules would be accorded the procedural rights upheld by us. Such an enhancement of the integrity of the process of "law enforcement" increases the respect for that process and thereby fortifies the commitment to the rule of law, which is of capital importance in a responsible, democratic institution. We therefore hold that a plaintiff who vindicates procedural rights under § 101 may, in the discretion of the court, be entitled to recover attorney's fees and that the discretion was not abused in this case. See *Stein v. Mutuel Clerks' Guild of Massachusetts, Inc.*, 560 F.2d 486, 492 (1st Cir. 1977) (sustaining an award of attorney's fees in an action brought to set aside the results of a disciplinary proceeding tainted by defective procedure).

(2) *Dolgen*

The jury's assessment of damages against Dolgen for wrongful discipline and denial of a full and fair hearing to appellees in violation of § 101 is contested on several grounds, including Dolgen's claims (1) that he was exempt from liability because, as manager of Local 10, he could not have played any official role in the disciplinary proceedings, (2) that the evidence of his domination of the proceedings was insufficient, and (3) that the verdict against him was inconsistent with the jury's finding that Local 10 did not prosecute appellees for an improper purpose. Although we conclude that the judgment against Dolgen for violation of § 101 must be reversed for other reasons, we find no merit in any of these grounds asserted by Dolgen.

As we pointed out in *Morrissey v. National Maritime Union*, 544 F.2d 19, 24 (1976), § 102 of the

Landrum-Griffin Act does not limit liability to the Union. Nor, in the case of union officials, should liability be limited to their acts within the scope of their authority. The Act was designed "to curb the power of overweening union officials" generally, including abuse of their positions or inducement of other officials to do so. See, in accord, *Keene v. International Union of Operating Engineers, Local 624*, 569 F.2d 1375 (5th Cir. 1978) (union officer with influence but, apparently, no official power over operation of hiring hall liable for wrongful denial of job references to political opponent); *Robins v. Schonfeld*, 326 F. Supp. 525, 531 (S.D.N.Y. 1971) (joint liability for attorney's fees); *Sands v. Abelli*, 290 F. Supp. 677, 685-86 (S.D.N.Y. 1968) (joint liability for punitive damages and attorney's fees).[23] Although union action is a prerequisite to any liability under § 102, since the purpose of the Act is to regulate the relationship between a labor organization and its members, see *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 194 (1967), a union official who aids abets, instigates, or directs a wrongful use of union power to deprive a member of his rights under § 101 may be held liable under § 102, which authorizes any person deprived of his § 101 rights to bring such "civil action . . . for such relief . . . as may be appropriate."

Although Dolgen is not immune from liability, we nevertheless reverse the judgment against him based on violation of appellees' § 101 rights because no evidence was submitted indicating injury attributed to Dolgen's alleged domination of the first two trials or to the imposition of a sanction allegedly at his

23 In *Robins* and *Sands*, the court assessed compensatory damages only against the union. See 326 F. Supp. at 532; 290 F. Supp. at 684.

behest. The evidence concerning damages on the federal claims consisted only of an undifferentiated reference to the entire course of the Union trials and appeals and to the hostility of all the Union officials involved in them. It therefore becomes unnecessary to resolve the possible inconsistency between the jury's verdict in favor of Local 10 on appellees' claim of retaliation and its award of damages on their claim against Dolgen.

II. State Law Claims Against Dolgen

We turn next to Dolgen's challenge to the judgments in favor of Rosario and Vega on their state law claims against him of false arrest and malicious prosecution. Dolgen argues that the trial court lacked jurisdiction over these claims, that the claims were substantively invalid, and that there was insufficient evidence to sustain the damage awards. We disagree.

The test for determining whether a court having jurisdiction over a federal claim may properly assume jurisdiction over a pendent state claim is whether the claims derive from a common nucleus of operative fact. *United Mine Workers v. Gibbs,* 383 U.S. 715, 725-27 (1966). This test is met in the present case. Although the federal claims arose primarily from the union disciplinary proceedings and the state claims from the confrontation in Dolgen's office on January 29, 1975, both were linked by the hostility of Union officials toward appellees' assertion of their § 101 rights. The January 29 events were unquestionably relevant to the LMRDA claims and Dolgen's conduct at the union trials bore on his motive and intent, an issue common to both claims. Cf. Fed. R. Evid. 404.

With this common background the claims "are such that [appellees] would ordinarily be expected to try them all in one judicial proceeding." 383 U.S. 715, 725 (1966). Moreover, interests of judicial economy clearly weighed in favor of trying them together, in view of the duplication of witnesses testifying with respect to both claims. Nor was there any likelihood of confusion or that the state claims would predominate.

Although the joinder of the claims precluded Dolgen from impleading the City of New York as a defendant, there is no showing of a significant likelihood that he could have successfully transferred liability to it. For the same reason we uphold the district court's refusal to permit Dolgen to state a cross-claim against the City pursuant to F.R.Civ.P. 13 (g) after appellees proposed to drop their direct claim against it, regardless of whether an independent basis existed for federal jurisdiction over it, see *Parris v. St. Johnsbury Trucking Co.,* 395 F.2d 543 (2d Cir. 1968); *Dery v. Wyer,* 265 F.2d 804 (2d Cir. 1959); *Fairview Park Excavating Co., Inc. v. Al Monzo Construction Co.,* 560 F.2d 1122 (3d Cir. 1977); 6 Wright & Miller, *Federal Practice and Procedure* §§ 1433, 1436; 3 Moore's Federal Practice ¶¶13.36, 14.26, since under F.R.Civ.P. 14 this matter lay within the district court's discretion, which was not abused.[24] See Advisory Committee Note to 1963 Amendment of Rule 14; *Laffey v. Northwest Air-*

24 Although Dolgen's claim against the City was, and technically remained a cross-claim, once appellees' claim against the City was dropped, the trial court's discretion to dismiss Dolgen's claim should be measured under Rule 14 since the effect of retaining the claim, like the effect of a true third-party claim, would have been to maintain the presence of a party who otherwise would not participate in the action.

lines, Inc., 567 F.2d 429, 477 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1968); 6 Wright & Miller, *supra,* § 1443 at 208. Indeed, if the City had been joined as a cross-defendant it may well have disputed Dolgen's version of the arrest, which would have prejudiced him in defending against appellees' claims.

Turning to the merits, Dolgen contends that the false arrest claim against him should have been dismissed as a matter of law for the reason that the police had probable cause to believe Rosario and Vega were committing in their presence criminal trespass in the third degree,[25] one of the offenses charged against appellees,[26] which would justify the arrest. *Broughton v. State,* 37 N.Y.2d 451, 458, 373 N.Y.S.2d 87, 95, *cert. denied,* 423 U.S. 929 (1975). However, the record reveals a sharp dispute as to the underlying facts, requiring submission of the issue to the jury, *Smith v. County of Nassau,* 34 N.Y.2d 18, 24-25, 355 N.Y.S.2d 349, 354 (1974), which appears to have rejected Dolgen's version. Moreover, even assuming *arguendo* that the police had probable cause to make an arrest, Dolgen would not necessarily be relieved of liability if he instigated the arrest and knew that there was no probable

25 "A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders." N.Y. Penal L. § 140.10 (McKinney). Third degree criminal trespass is a class B misdemeanor, punishable by imprisonment for a period not to exceed three months, or a fine in an amount not exceeding $500, or both. *Id.* §§ 70.15(2), 80.05(2).

26 Appellees were also charged with disorderly conduct, in violation of Penal L. § 240.20, and harassment, in violation of Penal L. § 250.20. These offenses are classified in New York law as "violations."

cause. See *Barnes v. Bollhorst,* 28 Misc. 2d 866, 868, 215 N.Y.S.2d 348, 350 (Sup. Ct. Nassau Cty.), *aff'd,* 14 A.D.2d 774, 219 N.Y.S.2d 916 (2d Dept. 1961); *Stearns v. New York City Transit Authority,* 24 Misc. 2d 216, 220, 200 N.Y.S.2d 272, 276 (Sup. Ct. N.Y. Cty.), *aff'd,* 209 N.Y.S.2d 264 (1st Dept. 1960); cf. *Schildhaus v. City of New York,* 7 Misc. 2d 859, 863, 163 N.Y.S.2d 201, 205 (Sup. Ct. N.Y. Cty. 1957), *rev'd as to another defendant,* 10 A.D.2d 566, 195 N.Y.S.2d 402 (1st Dept.), *rev'd,* 8 N.Y.2d 1108, 209 N.Y.S.2d 787 (1960); *Grago v. Vassello,* 173 Misc. 736, 739, 19 N.Y.S.2d 34, 37 (Sup. Ct. Madison Cty. 1940) (distinction between merely making statements that certain facts exist and leaving it to the authorities to decide whether to make an arrest and requesting or directing that someone be arrested). Obviously a person who knowingly gives false information to the police cannot then invoke the probable cause defense which might be available to the police acting upon the information given them. See *Trottier v. West,* 54 A.D.2d 1025, 388 N.Y.S.2d 180 (3d Dept. 1976); Prosser, *Law of Torts,* § 11 at 47 (1971).

The defendant in an action for false arrest has the burden of proving legal justification as an affirmative defense. *Broughton, supra,* 37 N.Y.2d at 458, 373 N.Y.S.2d at 95. The jury evidently did not believe Dolgen's version. Dolgen was therefore not entitled to a directed verdict on this count.

For the same reasons we reject Dolgen's contention that appellees consented to arrest and that the trial judge erroneously instructed the jury to the contrary. "Consent" to a confinement means not mere acquiescence but a voluntary assent, as, for example, occurs

when an individual is threatened with arrest and volunteers to accompany the police to the station in order to straighten matters out. See, e.g., *Foulke v. N.Y. Consolidated Ry. Co.*, 180 A.D. 848, 168 N.Y.S. 72 (2d Dept. 1917), *aff'd*, 228 N.Y. 269 (1920). Unless an individual tricks or goads the police into making an arrest, neither of which occurred here, his refusal to forego a right to remain where he is entitled to be does not constitute consent to a resulting unjustified arrest. See *Pierson v. Ray*, 386 U.S. 547, 558 (1967).

Dolgen's challenge to the judgment with respect to the malicious prosecution count raises a more difficult legal issue: whether appellees established that a criminal proceeding against them was commenced. Under New York law the commencement of a civil or criminal proceeding is a prerequisite to recovery on a theory of malicious prosecution. See *Broughton, supra*, 37 N.Y.2d at 457, 373 N.Y.S.2d at 93-94. Appellees argue that a criminal proceeding began with the issuance of the Appearance Tickets at the police station. Dolgen responds that an action does not commence until process issues from a judicial officer, and that this does not occur upon issuance of an Appearance Ticket. To our knowledge no New York court has addressed the question. We believe, however, that the issue should be resolved in favor of appellees.

For criminal procedural law purposes the issuance of an Appearance Ticket does not strictly speaking commence a criminal action as that phrase is defined by § 100.05 of the Criminal Procedure Law, which states that "a criminal action is commenced by the filing of an accusatory instrument with a criminal

court." An "accusatory instrument" is an information or a misdemeanor or felony complaint. *Id.* An Appearance Ticket does not "constitute an accusatory instrument for purposes of trial or plea." *People v. Jarmain*, 93 Misc. 2d 950, 951, 403 N.Y.S.2d 886, 887 (Crim. Ct. N.Y. 1978); *People v. Rodriguez*, 90 Misc. 2d 356, 394 N.Y.S.2d 542 (Village Ct. of Rockville Centre 1977). No prosecution may proceed upon issuance of an Appearance Ticket unless the "police officer or other public servant who . . . issued and served [the Ticket] . . . , at or before the time such Appearance Ticket is returnable, [has] file[d] or cause[d] to be filed with the local criminal court in which it is returnable an information, a simplified information or a misdemeanor complaint. . . ." N.Y. Crim. Pro. L. § 150.50(1). Relying upon a statement in *Broughton, supra*, that "some sort of prior judicial proceeding is the *sine qua non* of a cause of action in malicious prosecution," 37 N.Y.2d at 457, 373 N.Y.S.2d at 93-94 (citation omitted), Dolgen contends that no action commences for purposes of a tort claim of malicious prosecution until some independent official is presented with a formal accusation.

The definition of the commencement of a proceeding for purposes of the law of criminal procedure, however, does not necessarily coincide with the counterpart definition for purposes of the law of torts. *Weg v. Lippman*, 63 Misc. 2d 352, 312 N.Y.S.2d 862 (Civ. Ct. of N.Y. 1970). Moreover, in *Broughton*, where the question for decision was whether an indictment or arraignment creates a presumption of probable cause for arrest, rebuttable only by evidence of fraud or misrepresentation, the problems posed by the issuance of an Appearance Ticket were not before the court.

Prior to the advent in 1971 of the Appearance Ticket in non-traffic cases,[27] process obligating an individual to appear before a judicial officer to answer criminal charges could only be issued by a court or a magistrate. Hence, there was no occasion to decide whether issuance of non-judicial process commenced a criminal proceeding. If preservation of the integrity of judicial process were the sole concern of the law of malicious prosecution, we might adopt the position advocated by appellant Dolgen. But liability for the tort of malicious prosecution is also intended to protect an individual from the unwarranted defamation of character, inconvenience and anxiety suffered when he is compelled to appear in a court to answer anticipated criminal charges. In this regard the issuance of an Appearance Ticket may cause no less harm than issuance of a summons. Early New York cases recognized that an action for malicious prosecution enables an unjustly "prosecuted" individual to recover damages for the maligning of his character, see *Halberstadt v. New York Life Ins. Co.,* 194 N.Y. 1, 7 (1909), and for "the trouble and annoyance and expense of appearing an participating in the investigation of the charge." *Schneider v. Schlang,* 159 A.D. 385, 389, 144 N.Y.S. 543, 546 (1st Dept. 1913).

A summons, of course, may be issued only upon the *filing* of an accusation. But aside from this—the difference between a summons and an Appearance Ticket is that the former is issued by the court and the latter by the police. Either may be issued upon an accusation sufficient on its face, without further inquiry by the issuing officer. See N.Y. Crim. Pro. L.

27 Act of May 20, 1970, 1970 N.Y. Laws 3117.

§§ 120.20, 130.30, 150.20(2). As the statutory provision governing issuance of an Appearance Ticket following a warrantless arrest indicates, the Ticket is intended to enable the police and the accused to avoid the inconvenience of going before a magistrate upon a formal accusatory instrument. *Id.* § 150.20(2). Like a summons, however, an Appearance Ticket is obligatory. Failure to appear as directed is a crime. N.Y. Penal L. § 215.58. In fact, the court in *Farkas v. New York,* 96 Misc. 2d 784, 409 N.Y.S.2d 696 (Ct. Cl. 1978), commented that in light of the criminal sanction for disobedience of an Appearance Ticket, a Ticket issued for an alleged commission of a misdemeanor "may be deemed a process." 96 Misc. 2d at 787, n.3, 409 N.Y.S.2d at 698, n.3. The issuance of an Appearance Ticket is an official act; it is not merely the submission of an accusation by a private citizen. See Restatement (Second) of Torts, § 654, Comment d (1977).

The Appearance Ticket may have an impact on the accused just as severe as that of a summons. When either instrument is issued the accused bears the inconvenience and expense of appearing in court and, perhaps more important, is subject to the anxiety induced by a pending criminal charge. Moreover, if others learn that charges have been lodged against the accused, his character is no less traduced because the accusation is contained in an Appearance Ticket rather than in a summons.

For the foregoing reasons we believe that if a New York court faced the question before us it would rule that the issuance of an Appearance Ticket commences a prosecution for purposes of determining whether an action for malicious prosecution lies.

Dolgen argues that the judgments on the tort claims should be set aside because the trial court erroneously admitted into evidence under Fed. R. Evid. 803(6) a complaint report made out at the police station after appellees' arrest. Dolgen contends that this report did not qualify for admission under the business report exception to the hearsay rule because it lacked indicia of reliability, and that he was prejudiced by its admission because it suggested that Dolgen had told the police that appellees had entered his office without permission and that he intended to press charges.

According to Police Officer Acha, who was responsible for preparation of the report and signed it, a complaint report is filled out in the ordinary course of business whenever an arrest is made upon a citizen's complaint. The report is a one-page form requesting information regarding the names and addresses of the arrestees and of the complainant and a brief description of the incident resulting in the arrest. The form also contains a box to be checked if the complainant expresses an intent to prosecute.

The report prepared for appellees' arrest indicated that the complainant, Dolgen, intended to prosecute and stated:

> At above T/P/O [time and place of occurrence] [appellees] did enter office local 10 ILGW for a job at which time they were turned away. They created a scene and became very abusive. They then stormed into manager's office without permission or authority and refused to leave, and caused crowd to gather.

Officer Acha testified that since the report did not indicate that she witnessed the arrest, the informa-

tion must have come from Dolgen. Acha acknowledged that the entries were not actually made by her but testified that she reviewed the entries before signing the report and would not have signed it unless she thought it was accurate. The entries were probably made by another officer assisting the reporting officer by copying information from the arrest report which the latter prepared for each arrestee. According to Acha, this practice is not uncommon in a busy precinct house such as Midtown South.

Dolgen argues that the statements are hearsay, inadmissible under Rule 803(6) absent testimony by the prepared of the report that Dolgen made the statements attributed to him.[28] We disagree. Since the report was made in the regular course of the business activity of the Police Department and purported to be based on information from Dolgen, not from some bystander or third party, it was admissible under Rule 803(6). Its weight and the credibility to be extended to it were matters for the jury, which might be (and were) explored on cross-examination.

Thus there was proof entitling the jury to infer by a fair preponderance that Dolgen had maliciously used false information to cause the arrest and prosecution of Rosario and Vega, permitting an award to them of both general damages to compensate for injury to their reputation, mental anguish and emotional suffering, *Broughton, supra,* 37 N.Y.2d at

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28 Acha testified that the report's description of the incident resulting in the arrest may not be a verbatim record of the complainant's account, but that the description would include all significant details mentioned by the complainant. Although Acha did testify in this case, she had no present recollection of the preparation of the report.

459-60, 373 N.Y.S.2d 96, as well as punitive damages, *Nardelli v. Stamberg*, 44 N.Y.2d 500, 406 N.Y.S.2d 443 (1978); *Sanders v. Rolnick*, 188 Misc. 627, 67 N.Y.S.2d 656 (1st Dept. 1947).

CONCLUSION

The order and judgment of the district court setting aside the Union's discipline of appellees is affirmed to the extent that it prohibits the Union from (1) remanding disciplinary charges against a union member for retrial before essentially the same tribunal that has previously found them guilty or (2) denying an accused union member the right to record union disciplinary proceedings against him at his own expense where the Union does not provide a verbatim record of the proceedings. The judgment is reversed to the extent that it prohibits the Union from imposing the disciplinary sanction, after a full and fair hearing, of suspension of the accused member's right to attend union meetings for a specified period of time.

The judgment of the district court is further reversed to the extent that it awards damages to appellees against Local 10 and Dolgen for violation of appellees' procedural and substantive rights under § 101 of the LMRDA. The provision to the effect that appellees' counsel may be awarded a reasonable attorney's fee for vindication of their rights under the LMRDA is affirmed.

The judgments in favor of appellees Rosario and Vega awarding compensatory and punitive damages against Abe Dolgen for false arrest and malicious prosecution are affirmed.

Decision of the District Court

(caption omitted)

MOTLEY, District Judge. These are two actions brought by three concededly "dissident" members of Local 10, Amalgamated Ladies' Garemnt Cutters' Union (Local 10) charging that Local 10, the former manager, Abe Dolgen (acting in both his individual and official capacities), and the parent union, International Ladies' Garment Workers' Union (ILGWU), have all, in various respects, acted to abridge both the substantive and procedural rights afforded them by Title I of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§401 et seq. Jurisdiction is predicated upon Section 102 of the LMRDA, 29 U.S.C. §412. Additionally, plaintiffs have asserted a pendent state claim against Dolgen and the City of New York in the first action.

At the outset, the court has decided to consolidate the two cases. As will become readily apparent from the discussion of the two complaints, infra, the allegations constituting the federal claims in the two actions describe a pattern of union disciplinary activity springing from a single incident in January of 1975. To continue to treat these two actions as separate cases, even with the different named defendant parties, would be the height of folly. Accordingly, the court orders the cases consolidated, as it clearly can on its own motion. 5 Moore's Federal Practice, ¶42.02 at 42-7 (2d ed. 1976).[1]

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[1] The cases collected in that citation make clear that the court can order consolidation even over the objection of a party, as in this case.

In both cases, the various defendants have moved to dismiss the complaint. The City has moved to dismiss, pursuant to Rule 12(b)(1), Fed.R.Civ.P., on the ground that the court lacks jurisdiction of the claim asserted against it. The remaining defendants in the first action have sought dismissal on the ground that the complaint fails to state a claim upon which relief can be granted, Rule 12(b)(6), and, in the case of Local 10, on the ground that the action is moot. Since Dolgen and Local 10 have accompanied their motions with substantial evidentiary affidavits, the court will treat their motions as requests for summary judgment. Rule 12(b). Plaintiff has cross-moved for summary judgment of liability on two issues. In the second action, both Local 10 and ILGWU have moved for summary judg- preliminary injunction and for leave to file a supplemental complaint. For the reasons set forth infra, plaintiffs' motions for summary judgment, for leave to file a supplemental complaint, and for a preliminary injunction will be granted. The various motions to dismiss will be granted in part and denied in part, as indicated.

Although certain of the facts in this case are bitterly contested, the main outlines of the case are reasonably clear and may be set forth to place the disputed issues in perspective. A brief consideration of the complaints will serve to indicate some of the problems presented by this case.

Facts

The first complaint alleges that, prior to the events in question, all three plaintiffs were members in good standing of Local 10, and that they had been actively opposed to the policies and practices of the incum-

bent officialdom of that Local, including defendant Dolgen, who was its Manager. On January 29, 1975, the plaintiffs allegedly entered Dolgen's office, at his invitation, to protest alleged discrimination in the employment referral practices of the Local and of Dolgen in particular. Subsequently, after a period of time, Dolgen left the office and returned in the company of two New York City police officers. After some discussion, the substance of which is in dispute, the police officers left with Rosario and Vega. According to plaintiffs, defendant Dolgen instructed the officers to place them under arrest; according to Dolgen and Local 10, no such instruction was ever given at the office, and the police were merely asked to remove the plaintiffs who were allegedly obstructing union business.

According to the complaint, defendant Dolgen, "acting in his individual capacity", thereafter filed intra-union charges against plaintiffs on or about February 10, 1975. The charges, filed with the Secretary of the Executive Board of Local 10, alleged that plaintiffs violated certain portions of the union constitution[2] "[i]n that on January

[2] Plaintiffs were specifically accused of the following transgressions of the union constitution.

"1. Interfering with the functions and powers of officers, business agents, representatives, employees and agents of local 10, I.L.G.W.U....

"2. Interfering with the functions and powers of Local 10, I.L.G.W.U....

"3. Disobeying and failing to comply with orders and decisions of officials of Local 10, I.L.G.W.U. ...

"4. Action and conduct detrimental to the interests of the I.L.G.W.U. and of Local 10....

"5. Action and conduct unbecoming a member, occurring in connection with membership in the I.L.

29, 1975 each in conjunction with each other, jointly took possession of the office of the Manager of Local 10, obstructed and interfered with the conduct of the usual business of Local 10, interfered with the functioning of the business agents and officers of Local 10, and refused to leave said office when ordered to do so by officers of Local 10.

"And further, in that Raymond Cabel subsequently left the office of the manager, proceeded on to the waiting room in the premises of Local 10, and sought to provoke physical action against the elected adminis-

G.W.U. and employment in its jurisdiction...."

Those specifications of misconduct were alleged, respetively, to have been in violation of the following provisions of Section 1, Article 20 of the I.L.G.W.U. constitution which provides that "/a/ member may be censured, fined, suspended, expelled or otherwise disciplined

"(e) for assuming, usurping or interfering with the functions or powers of, or without authorization acting in any manner as, an officer, executive board member, business agent, representative, employee or agent of the I.L.G.W.U. or of a subordinate organization;

"(f) for assuming, usurping or interfering with the functions and powers of the I.L.G.W.U. or a subordinate organization or supporting and organization which does so;

"(g) for disobeying or failing to comply in time with an order or decision of the I.L.G.W.U., G.E.B. /General Executive Board/ or a subordinate organization;

"(i) for any action or conduct detrimental to the interests of the I.L.G.W.U. or a subordinate organization;

"(l) for any action or conduct unbecoming to a member which occurrs in connection with his membership in the I.L.G.W.U. or employment in its jurisdiction /./"

tration of Local 10, by members of Local 10 who were in such waiting room."

Plaintiff alleges that "[t]he charges filed by Dolgen as aforesaid were and are false and were filed by him in an attempt to inhibit, impair and/or intimidate plaintiffs in the exercise of rights guaranteed them by the LMRDA."

It is further alleged, and not contested, that the charges preferred against plaintiffs were heard by the Executive Board of Local 10 sitting as a grievance committee,[3] on February 25, 1975, and that plaintiffs were found guilty as charged. Beyond the fact that a trial took place and that plaintiffs were disciplined, very little about the February 25 hearing is not in dispute. Plaintiff alleges that defendant Abe Dolgen, although the charging party, "participated actively as Chairman" of the Executive Board and as a member thereof during the conduct of the trial, the deliberations following trial, and the formulation of decision. The complaint further alleges that "[c]ertain persons, business agents of Local 10 who were witnesses to the events in question, and who testified in support of the charges at the said trial, also participated as members of the trial body in the conduct of the trial, the trial body's subsequent deliberation, and its decision." To rebut these allegations, Local 10's attorney has submitted copious affidavits, notably those of Nat Klein, the Secretary of the Executive Board, which seek to establish that Dolgen and the other business agents did not improperly participate in the deliberations, and were not members of the Executive Board, but

[3] Article 21, Section 3 of the I.L.G.W.U. constitution.

merely performed their proper and circumscribed functions as charging party and witnesses, respectively. Plaintiff Rosario has duly submitted a responsive affidavit challenging the veracity of defendants' account of the proceedings, and again asserting that Dolgen "formally chaired" the meeting and "directed proceedings". At the very least, it is safe to conclude that the "facts" concerning this disciplinary hearing are in dispute -- a dispute which is not satisfactorily removed by the simple assertion in Klein's affidavit that Dolgen was not officially a member of the Executive Board.

By letters dated February 28, 1975, plaintiffs were separtely notified of the decision of the Executive Board. In part, the letter recited that "the Executive Board has voted to suspend you from participation in all Union activities for a period of one year from the date of this decision. This does not prevent you from taking up such business as a member may properly have in the Union office, as long as you do not interfere with the operation or activities of the Union office."

Plaintiffs duly appealed the decision to the Appeal Committee of the General Executive Board (GEB) of the I.L.G.W.U. That body reversed the Executive Board's decision. While noting that "[o]n the evidence in the record, the Local 10 Executive Board could properly have found the accused guilty as charged", the Appeal Committee remanded the case to Local 10's Executive Board on the ground that that body had improperly permitted Dolgen and his witnesses to be present during the deliberations on the charges in question. The Appeal Committee ostensibly assumed that the reason for the

continued presence of Dolgen and the witnesses had been that the disciplinary hearing had preceded a regular business meeting of the Executive Board, at which Dolgen and the other officer-witnesses would ordinarily present reports. The Committee also made clear that "[t]here [was] no evidence in the record, and none was presented by the accused, that any of the persons involved in the hearing as a charging party or as a witness, participated in or influenced the decision appealed from." However to avoid any appearance of impropriety, the punishment was vacated, and the charges remanded with instructions to Local 10's Executive Board to make its decision in executive session.

By letter to the Secretary of the Executive Board, Dolgen again preferred the identical charges against plaintiffs, and these charges were heard by the Executive Board on May 21, 1975. According to the complaint, "[t]he executive board which conducted the second trial ... was substantially the same exectuive board that had conducted the [first] trial...." Plaintiffs allege, and defendants do not dispute, that several members sat on both trials, both of which unanimously found them guilty as charged and imposed identical punishments. According to plaintiffs, utilization of the same body for retrial -- a procedure sanctioned by the union constitution[4] -- resulted in a trial body whose members were "biased" against plaintiffs, and who had prejudged plaintiffs guilty of the charges against them.

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[4] Section 9 of Article 22 provides that "/n/o person shall be tried twice by the same body on the same charge, except where a retrial has been ordered by an appellate body."

In a separate assignment of error, plaintiffs allege that the Executive Board at the second trial was "controlled and manipulated" by defendant Dolgen who, in so controlling and manipulating it, was "actuated by malice", presumably against plaintiffs herein. As with respect to the charges of impropriety directed toward the first trial, defendants have submitted affidavits seeking to establish that the allegations regarding manipulation are unfounded. Rosario, in response, has submitted an affidavit alleging that, among other things, "Dolgen sat in the audience and directed proceedings from there...." Suffice it to say that the actual facts concerning Dolgen's role in the second trial proceeding are also in some dispute.

At each of the trials at the Local level, plaintiffs allege that they requested the right to make their own record of the proceedings, whether by tape recording or by bringing a competent stenographer. Although defendants dispute whether plaintiffs ever requested to bring a stenographer, as opposed to a tape recorder, they admit that plaintiffs were not permitted to make an electronic record of the proceedings, and they have, in the affidavit of the Secretary of the Executive Board, made clear that the Local would not have permitted the use of a stenographer even if it had been requested.

Plaintiffs further allege that, subsequent to each of the trials described above, they requested the right to examine the official, non-verbatim minutes of the trials which had been taken by a member of the Executive Board, but that they were denied the right to inspect such minutes.

Subsequent to the second trial, plaintiffs again appealed to the Appeal Committee of the GEB. By letter dated July 28, 1975, plaintiffs were notified that the Appeal Committee had rejected their appeal and affirmed the decision of the Executive Board of Local 10. All assignemnts of error were rejected. The Committee held (1) that plaintiffs had presented no evidence to support their charge that the Executive Board was biased and had prejeudged their case, and that such a conclusion could not be drawn merely from the fact that the same body heard both cases; (2) that plaintiffs had presented no more than a "bare, unsubstantiated statement" that Dolgen controlled and manipulated the hearing and decision at the second trial; (3) that the minutes prepared by the Executive Board were accurate, plaintiffs having presented no evidence to the contrary; (4) that plaintiffs were not entitled to a copy of the minutes of the trials below;[5] (5) that the Executive

[5] The Appeal Committee specifically indicated as follows:

"Appellants' contention that they were denied access to the record and therefore unable properly to prepare their appeal, is without merit. What is involved is not access to the record, but appellants' demand for a copy of the Minutes of the May 21 hearing. The procedure under the ILGWU Constitution, adopted by the membership of the Union at convention, and readopted by convention after convention (the last of which was in 1974), is that minutes of a disciplinary proceeding are prepared by the secretary of the trial body, who is a member of the Union. If an appeal is taken, a copy of the minutes is forwarded to the appellate body. Copies of such minutes are not provided to either the charging party or the person charged. From their appearance before the G.E.B. Appeal Committee at the first appeal in connection with these same charges appellants were a-

Board had properly refused to allow plaintiffs to make a tape recording of the proceedings; and (6) that plaintiffs' statements denying the charges were refuted by the "overwhelming weight" of the evidence of their guilt.

In September of 1975, plaintiffs brought this first action naming as defendants Dolgen, individually and officially, and the City of New York. The federal claim, predicated upon the events above set forth, asserted that the Executive Board had imposed the disciplinary punishment above described in retaliation for plaintiffs' exercise of the critical rights guaranteed them by the LMRDA, and that the punishment was therefore in violation of 29 U.S.C. §529.[7] The com-

ware that at the appeal hearing, the minutes and any other pertinent material in the record would be read in their presence, and the opportunity afforded them to point out any errors or omissions. Also, they were advised in the letter notifying them of the appeal hearing date, that they could present any evidence they wished in support of their appeal, subject only to the requirement that it be relevant. For their own reasons, they chose a procedure which prevented this process from coming into play." /The latter statement presumably refers to the fact that plaintiff chose not to appear personally at the appeal hearing, but rather to rest on their written submissions./

6 "The Local 10 Executive Board peropery refused to allow the appellants to make an electronic recording of the hearing. Under our Constitution, there is only one official record of a disciplinary proceeding, prepared by the secretary of a trial or appeal body. The wisdom of this rule has been corroborated by the evidence in recent public history of the manner in which 'tapes' can be manipulated."

7 That section provides, in pertinent part, that

plaint further alleged that plaintiffs had been denied the "full and fair hearing" guaranteed them by 29 U.S.C. §411(a)(5)(C),[8] for the particular reason that the members of the trial body which imposed the discipline upon plaintiffs were biased against them and had prejudged their case. Furthermore, the complaint alleged that the disciplinary punishment imposed was invalid on its face, in that it "purports to deny to members of a labor organization rights and privileges guaranteed them by the LMRDA." Plaintiff further alleged consequent damage to reputation and mental suffering. A second cause of action, discussed in greater detail below, asserted a state tort claim against Dolgen (in his individual capacity) and the City of New York. The relief requested included (1) a declaration that the punishment in question was "null, void, and invalid", (2) an injunction restraining "defendant Local 10" and its agents from giving any effect to the punishment; (3) compensatory damages of $10,000 for each plaintiff for the alleged violations of the LMRDA; (4) compen-

"/i/t shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof ot fine, supsend, expel, or otherwise discipline any of its members for exercising any right two which he is entitled under the provisions of this chapter."

8 Section 411(a)(5) provides as follows: No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (b) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

satory damages of $10,000 for each plaintiff from defendant Dolgen, individually, and/or the City of New York on the pendent state count; (5) punitive damages of $25,000 for each plaintiff from defendant Dolgen (without specifying whether in his individual or representative capacity); and (6) costs and attorney's fees.

It turned out, however, that the filing of the first suit was but another chapter in the tortuous history of this intra-union litigation. By decision of October 8, 1975, the General Executive Board of the ILGWU, on its own motion,[9] reviewed the decision of the Appeal Committee and directed that the charges be reheard de novo by a Trial Committee of Local 10 under certain specified conditions.[10] The events incident to this appellate direction and the subsequent, third disciplinary hearing by Local 10 form the subject matter of plaintiffs' second complaint, filed in late July of 1976.

[9] Under the I.L.G.W.U. constitution, there is no appeal of right from an appellate decision of the G.E.B. Appeal Committee to the full General Executive Board itself. The only appeal of right is from the Appeal Committee to the next triennial or special convention of the I.L.G.W.U. which, in this case, was no scheduled until May of 1977. However, the GEB may on its own motion, "review, affirm, modify or reverse" a decision of the Appeal Committee, and a decision of the GEB may likewise be appealed, as of right, to the next triennial or special convention of the I.L.G.W.U. Article 23, Section 5.

The GEB decision of October 8, 1975 does recite that "... the three accused members of Local 10 have failed to utilize their right under the I.L.G.W.U. Constitution to appeal to the full General Executive Board ... from the attached decision of its Appeal Committee...." However, it seems clear from a plain reading of the constitution that plaintiffs' "appeal" to that body would have been entirely at the discretion of the GEB itself.

The next regularly scheduled membership meeting was to be held on November 24, 1975. Plaintiffs allege that Local 10 failed to give its members "full notification" of the November 24 meeting and that, "as a result of such failure the actual attendance by members at the said meeting was unusually low and allowed for a greater than usual

[10] "It is the decision of the GEB that because of the special circumstances surrounding the case, and the fact that the charges have already been heard twice by the Executive Board of Local 10, the charges shall be reheard de novo by a Trial Committee of Local 10, under the following conditions:

"(1) The Trial Committee shall be composed of rank-and-file members of Local 10 and shall consist of five (5) members and two (2) alternates selected by the membership of Local 10 at the next general membership meeting of the Local. Persons serving on the Trial Committee shall not have previously been involved in hearing the charges or in making the charges or in defending against them.

"(2) The Trial Committee shall select one of its members as Chairman. It shall also select a Secretary from among its members who shall prepare the official minutes of the hearing which shall be filed in the offices of Local 10. The official minutes or true copies thereof shall be made available for inspection in the offices of Local 10 by either the charging party or the accused upon their written request therefor. True copies of the minutes shall be furnished if so requested in writing.

"(c) Should the Trial Committee find the accused or any of them guilty, any penalty which might be imposed shall not include disqualification as a candidate for Union office."

domination of the meeting by the incumbent officers of Local 10." Affidavits submitted by plaintiffs and defendants are in disagreement as to whether the notice for this meeting differed in any material respect from that given for any other meeting. Moreover, they differ further as to the reasons for the lower attendance at the meeting.

The meeting was, in any event, held on November 24, and a Trial Committee was elected. Plaintiffs allege that the Trial Committee was selected over their objections, in that the election was held by an open hand vote (rather than by secret ballot) and "in such a manner that persons selected and hand-picked by the Manager of Local 10 and by others allied with him, were elected." They further allege that the members of the Trial Committee were "allied with the incumbent officialdom of Local 10 and biased against each of plaintiffs because of plaintiffs' opposition to the officers." Not surprisingly, Local 10 vigorously excepts to these conclusory allegations and has submitted extensive affidavits by both the members of the Trial Committee and also by Nat Klein, the Secretary of Local 10's Executive Board, averring that the Trial Committee was not selected in an undemocratic manner, that its members were not "hand-picked" by Dolgen, and that they were able to render -- and did render -- an unbiased opinion on the charges preferred against plaintiffs.

Plaintiffs were duly notified of the Trial Committee hearing scheduled for December 18, 1975. Prior to the date of the hearing, plaintiffs requested by letter that they be supplied with copies of the official minutes of the two previous trials which had resulted in disciplinary action against them (February 25, 1975 and May 21, 1975) and

also the minutes of the GEB Appeal Committee hearings on April 8, 1975 and July 22, 1975. The stated ground for these requests was that "[t]hese minutes are necessary for [plaintiffs] to have a fair opportunity to prepared [sic] and present a defense at the trial...." The requests were denied by both Local 10[11] and the I.L.G.W.U.[12]

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[11] Counsel for Local 10 indicated the basis for his refusal in a letter to plaintiffs' counsel: "I believe it to be the better part of wisdom not to give any copies of these minutes to anybody. The Grievance Committee decision for the first time was reversed by the GEB Appeal Committee and remanded for a new trial. The new trial which was subsequently held was reversed by the GEB itself at its meeting on October 8, 1975, and the charges remanded for a new trial by a trial committee elected by the membership of Local 10 for a new hearing. The election will take place November 24, 1975.

"I believe that giving minutes which set forth the particulars of either of the former trials before the Grievance Committee of Local 10 would be highly prejudicial to Messrs. Cabel, Rosario and Vega and not in the best interests of Local 10 and its members. If copies of these minutes should be given to Messers Cabel and /his lay counsel/ or to you and should be reproduced and handed out to members of Local 10, some of whom may be elected to serve on the Trial Committee or handed out to members of the Trial Committee after they have been elected, they would be extremely prejudicial.

"The proceedings at the Executive Board of Local 10 sitting as a Grievance Committee with respect to the charges filed by Dolgen individually against Cabel, Rosario and Vega are as dead as a 'dodo" since they have been mooted by the decision of the GEB on October 8, 1975. I prefer, in the interests of a fair new trial, and have so advised /the Secre-

On December 18, plaintiffs appeared at the Trial Committee hearing and insisted upon the right to make their own tape recording of the trial. According to the complaint, "it would have been futile for them to have appeared, alternatively, with a court reporter or competent stenographer for the purpose of making a record, and the futility of such an appearance was made manifest by previous statements and denials of their previous requests." As noted previously, subsequent admissions in affidavits submitted by Local 10 make it clear that the latter statement is correct, and that neither stenographer nor tape recorder would have been permitted.[13]

tary of the Executive Board/, that they remain so.

In a later letter to plaintiff Rosario, Local 10's counsel again indicated that "/t/hese minutes are not available to anybody since the General Executive Board ordered a new trial on the merits. They are not necessary for you to prepare a defense since you do not know who will be the witnesses in support of Brother Dolgen's charges against you or what their testimony will be."

[12] The Assistant Executive Secretary of the GEB replied to plaintiff's letter request for the minutes of the GEB Appeal Committee hearings as follows: "In the interest of a fair, impartial, and genuinely de novo hearing on the charges, teh Trial Committee hearing ordered by the GEB, which you are apparently now preparing to attend, should be entirely separated from the hearings and decisions which preceded it; the Trial Committee should in no way be influenced or give the appearance of being influenced by the earlier hearings. Accordingly, your request for access to the minutes of the earlier hearings of the GEB Appeal Committee is hereby denied."

[13] A later affidavit submitted by the President of the I.L.G.W.U. makes clear that a similar policy would have governed hearings before the GEB Appeal Committee.

Because of plaintiffs' insistence on their right to make a tape recording of the proceedings, the hearing was adjourned until January 8, 1976. In a letter to Rosario dated December 24, 1975, the chairman of the Trial Committee indicated that the meeting was adjourned "to give you an opportunity to decide whether you would proceed with the hearing without a tape recorder or other electronic recording device and advised you that if you again produced a tape recorder or any other electronic recording device, the hearing would proceed in the absence of the accused." In response to a reinterated request for minutes of prior trials and appeals, the chairman said, "I cannot go into the question, at this time, of the minutes you [have requested]. Neither I nor the Trial Committee can make any ruling until we hear the arguments why these documents are necessary to prepare for a new trial and why the minutes requested have been refused. Our Trial Committee will make this ruling only if you appear at the adjourned hearing without a tape recorder or any other electronic recording device and after we hear the arguments."[14]

Despite the clear import of the letter from the chairman of the Trial Committee, the three plaintiffs and their lay counsel appeared at the scheduled January 8, 1976 hearing insisting upon their right to tape record the proceedings. When they refused to relinquish their asserted right to make

[14] It is not clear whether, even if the Trial Committee had decided to release the minutes of the previous trials, it would have had the authority to do so, in view of the previous denial of those minutes by Local 10's counsel. It does seem clear, however, that the Trial Committee would not have had authority to release the minutes of the appeals, which were prepared by the parent union.

their own tape recorded record of the hearing, the members of the Trial Committee retired to an adjacent room to conduct the trial in their absence.[15]

The precise circumstances under which this third trial was conducted are in dispute. Plaintiffs assert in their complaint, and have submitted affidavits to buttress their position, that the Trial Committee "entered another room from which plaintiffs were excluded, locked the loor" and proceeded to conduct the trial in their absence and in the absence of their lay counsel. Defendants, in turn, assert through affidavits that the door to the hearing room was never locked, that plaintiffs and/or their lay counsel were free to enter and participate fully in the proceedings if only they would drop their demand that they be able to tape record the proceedings, and that, in any event, the Committee considered plaintiffs' written statements. Whatever the exact facts may be, it is clear that, due to their insistence on the right to make a tape recording, plaintiffs were excluded from this trial. By written decision dated January 29, 1976 (and received by plaintiffs), the Trial Committee sustained the first of the two charges preferred against all three plaintiffs. It

[15] Although the members of the Trial Committee apparently did not at that time indicate on what authority they intended to try plaintiffs without their presence, subsequent papers seem to indicate that such action is predicated upon Section 4 of Article 22 of the I.L.G.W.U. consitution: "If the accused member fails to appear at the time and place designated for the trial without presenting a good reason for his absence, the trial body shall proceed to take testimony and try the case in the same manner as if the accused were present."

suspended Rosario and Vega for a period of 18 months, and Cabel for a period of one year, from attending or participating in membership meetings of Local 10. It did not sustain the second charge, which had been preferred against Cabel only.

Plaintiffs again duly filed an appeal to the Appeal Committee of the GEB, which met to hear the appeal on April 8, 1976. Plaintiffs appeared with their lay representatives and again insisted on the right to make their own tape recording of the proceedings. The chairman of the Appeal Committee, distinguishing between the use of a tape recorder and that of a public stenographer, which they had not requested, refused to proceed with the appeal until plaintiffs desisted from the use of the recorder. Plaintiffs refused and the hearing was thereupon adjourned sine die. Subsequent letters exchanged between plaintiffs and the Secretary of the Appeal Committee made clear that resumption of the hearing on the appeal was contingent merely upon plaintiffs' acquiescence in the ruling by the Appeal Committee barring their use of tape recorders. Due to their refusal to comply with that ruling, plaintiffs and the union remained in a stand-off, and the appeal was never heard.

In this posture of the union proceedings, plaintiffs filed their second suit on July 20, 1976. As in the first action, they alleged, in substance, that the disciplinary action against them was merely a pretext for retaliation against them due to their outspoken criticism of and opposition to the "incumbent officialdom" of Local 10, and was, therefore, in violation of 29 U.S.C. §529.[16]

[16] See note 7, supra.

They further alleged that the disciplinary actions violated their rights to free speech within the union and to attend and participate equally with others at union meetings.[17] Finally, they again alleged that they were denied a full and fair hearing on the charges against them. They sought injunctive and declaratory relief substantially identical to that requested in the first suit, as well as an order "directing defendants to accord plaintiffs all the rights and privileges of membership in Local 10 and [the ILGWU]." And they sought compensatory and punitive damages, as well as attorney's fees and costs.

Institution of this second suit merely set the stage for further battle among these litigious parties, however, In late August of 1976, plaintiffs moved in this court for a preliminary injunction preventing Local 10 or the I.L.G.W.U. from effectuating the punishment imposed upon them by the Trial Committee's decision of January 29, 1976. After considering extensive briefs and affidavits, hearing extended argument, and taking some testimony, the court granted the motion and enjoined those defendants and their agents "from giving any force or effect to the disciplinary punishment of suspension from attending membership meetings imposed upon plaintiffs"

[17] In violation of 29 U.S.C. §411(a)(1): "Equal rights -- Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

by that decision, "pending trial and ultimate disposition of this action". As stated in its brief Memorandum Opinion of September 20, 1976, the court merely found that plaintiffs had raised a sufficiently serious question concerning their entitlement to make their own record of the disciplinary proceeding to make such preliminary relief warranted under the accepted criteria in this Circuit. See Sonesta International Hotels Corp. v. Wellington Associates, et al.,483 F.2d 247, 250 (2d Cir. 1973). When defendants appealed that decision, the Court of Appeals affirmed from the bench on November 9, 1976.

With litigation temporarily at a halt in the federal court, however, activity was renewed within the Union. On December 14, 1976, the Executive Committee of the GEB rendered a "Decision"[18] concerning the charges brought by defendant Dolgen. Noting the "unusual circumstances" presented by this court's action in the case, and without establishing any precedent for any other trial or appeal, the Executive Committee decreed that "the appeal from said charges shall be heard and determined" by a Special Appeal Committee of the GEB under certain specified circumstances. The "appeal" was to be heard by committee consisting of five vice-presidents of the I.L.G.W.U., none of whom had heard the appeals previously taken in April and July 1975 from the decision of the Executive Board of Local 10. "The appeal from the Trial Committee's decision of January 29, 1976 [was to be] a hearing de novo by the Special

[18] citing Article 3, Section 7 of the I.L.G.W.U. constitution, which gives the Executive Committee full powers of the GEB between sessions of that body.

Appeal Committee." The accused and charging party were to have the right to be present in person or by lay counsel; to present any evidence they wished; to confront and cross-examine the witnesses; and to make opening and closing statements, "as is customary in disciplinary proceedings in the ILGWU." Upon written request from one of the plaintiffs, they were to be supplied with the minutes of both the first and second trials and appeals. The minutes of the "de novo appeal hearing" were to be taken by a certified shorthand reporter, at the ILGWU's expense, and copies of the minutes were to be supplied to the plaintiffs. Any penalty assessed by the Special Appeal Committee, "other than suspension from all the rights of membership or expulsion," was not to include disqualification as a Union officer. The hearing was to be held promptly after the date of the election of officers of Local 10 in the spring of 1977, and a copy of the Committee's decision was to be sent to each of the accused. Any appeal from the decision of the Committee was to be to the next convention of the I.L.G.W.U. [19]

Copies of the Decision were sent to the plaintiffs by letter of December 14, along with a cover letter explaining that the Decision was "in connection with the appeal" taken by plaintiffs. Copies were also sent to the charging party (defendant Dolgen), to the Chairman of the Trial Committee of Local 10, and to Local 10. By subsequent letter to the same parties dated February 28, 1977, plaintiffs were informed that, as indicated in the earlier Decision, "the Special Appeal Committee of the General Executive Board will hold a hearing de novo on the appeal from the

19 "/I/n accordance with Section 5 of Article 23 of the Constitution."

Trial Committee's decision of January 29, 1976" on March 23, 1977 at the specified meeting place.

In response, plaintiff directed a letter dated March 14, 1977 to the Secretary of the Special Appeal Committee protesting against what they alleged were the Committee's attempts to retaliate against them and harrass them. Specifically, they contended that, by their previous appearance before the Appeal Committee, they had exhausted their intra-union appellate remedies (at least, presumably, as far as required by the L.M.R.D.A.) and they had no further need to participate in the I.L.G.W.U.'s disciplinary proceedings. Accordingly, they indicated that they would not attend the "de novo hearing."

In reply (by letter dated March 16), the Secretary of the Special Appeal Committee indicated that the "hearing de novo on [their] appeal" would be held as previously decided. Moreover, he revealed that the Executive Board's Decision had been ratified by the full G.E.B. on February 16, 1977. He also called to their attention Article xx, Section 4 of the I.L.G.W.U. constitution which, as indicated previously, [20] provides that "trial" may be conducted in the absence of the accused if he fails to appear without offering some good reason for his absence.

Plaintiffs did not respond to the letter. Nor did they appear at the "de novo hearing" on March 23, which was held in accordance with the conditions specified in the Executive Committee's Decision of December 14.

20 See note 15, supra.

By letter of April 11, 1977, the Secretary of the Special Appeal Committee sent to plaintiffs copies of both the stenographic transcript of the hearing and also the Statement and Decision of the Committee. In brief, the Committee found all three plaintiffs guilty of the charges filed against them jointly by defendant Dolgen. The Committee did not reconsider the charge against Cabel alone, which had not been sustained by the Local 10 Trial Committee (whose finding in that regard had not been earlier appealed). It suspended Rosario and Vega from attendance at and participation in all regular membership meetings of Local 10 for a period of 18 months, and imposed a similar suspension on Cabel for a period of 12 months. All three plaintiffs were given "credit for the period during which the discipline of the Trial Committee of Local 10 was in effect, namely from January 8, 1976 through September 20, 1976." The covering letter concerning what was now denominated the "de novo trial" of plaintiffs called attention to the portion of the Statement and Decision which provided that plaintiffs could appeal directly to the next convention of the I.L.G.W.U. to be held in May of 1977.

In response, plaintiff Rosario wrote, on April 14, that the Special Appeal Committee was without authority under the I.L.G.W.U. constitution to conduct any "trial" of a member, and was only empowered to decide appeals. Moreover, he argued, a decision on any "appeal" from the Trial Committee's decision of January 29, 1976 would necessarily be in contempt of this court's order enjoining both Local 10 and the I.L.G.W.U. from giving any effect to the Trial Committee's decision.

The I.L.G.W.U. did not respond to Rosario's latest communication. However, in early May, plaintiffs sought to have the I.L.G.W.U. declared in contempt of this court's September 20, 1976 order on the ground that the most recent hearing mandated by the GEB's Executive Committee represented a thinly disguised attempt to effectuate the Trial Committee's order. They also sought to have the earlier order amended to prohibit either Local 10 or the I.L.G.W.U. from conducting any further trial of plaintiffs or imposing any further punishment for the charges brought by defendant Dolgen. After considering the parties' submissions and hearing argument, the court declined, on May 13, 1977, to grant the requested relief.

In view of this defeat, plaintiffs filed their appeal to the Convention on May 16. The appeal letter argued in the alternative. If, plaintiffs argued, the decision of the Special Appeal Committee were treated as an appeal from the Trial Committee's determination in January of 1976, then they asserted that that earlier trial was unfair, substantially for the reasons set forth in this action. If the Committee's action were to be treated as an original disciplinary proceeding, they argued that the proceeding exceeded the powers of the GEB and violated the I.L.G.W.U. constitution. They also raised several other assignments of error, including those which they argue in this court.

Despite very adequate notification -- which they do not dispute receiving -- of the time and place of the hearing before the Appeals Committee of the Convention, they did not attend the appeal. The Appeals Committee, after considering their appeal letter and all the material available to the Special Appeal

Committee of the GEB, affirmed the decision of the Special Appeal Committee in all respects. On the Appeal Committee's recommendation, the full Convention also unanimously affirmed the decision of the Special Appeals Committee.

Now plaintiffs have again come before the court, seeking (1) permission to serve and file a supplemental complaint in the second action covering the events which have transpired since the filing of their initial complaint in July of 1976 and (2) a preliminary injunction barring the defendants from giving any force or effect to the Decision of the Special Appeal Committee (as affirmed by the Convention) or from excluding plaintiffs from attendance at or participation in any membership meetings or other meetings of Local 10. For the reasons set forth below, the court has determined that both these motions must be granted.

Discussion

In the first place, the court holds that the punishment imposed upon plaintiffs is void on the ground that it impermissibly abridges rights guaranteed to them by federal law.

Briefly stated, the punishment suspends plaintiffs from participation in, or attendance at, regular membership meetings of Local 10 for varying periods of time while leaving their other membership rights unimpaired. Capel's period of suspension has now expired; however, Rosario and Vega are still under suspension.

Plaintiffs' arugment is very straightforward, but not simplistic. There is no

question that plaintiffs, even under the disciplinary conditions imposed, remain "members" of the union, within the meaning of that term as defined in the L.M.R.D.A., 29 U.S.C. §402(o). All "members" are entitled to the equal rights and privileges guaranteed a "member" by the L.M.R.D.A., 29 U.S.C. §411[21](a)(1), and any denial of those equal rights and privileges may be enjoined.[22] Since "members" are statutorily entitled "... to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings," the argument runs, plaintiffs cannot be prevented from attending membership meetings as long as they have not been suspended or expelled from the union.

The precise question is whether the strictures of 29 U.S.C. §411(a)(1) limit the "other discipline" to which §411(a)(5) makes reference. That latter section clearly indicates that punishments other than fines, suspension, and expulsion are available to the union. The issue is whether, even (as in this case) in the absence of any claim that the punishment is unduly harsh for the offense charges, or that the punishment is being discriminatorily applied to these plaintiffs (as against all others convicted of the same offense), the statute forbids unions from imposing the sanction of suspension from attendance at membership meetings.

In the court's view, the union may not impose such a suspension. The clear intent of Congress in passing a "Bill of Rights" for union members was to ensure that internal union democracy would not be sacrificed on the altar of internal efficiency, see

21 See note 17, supra.

22 29 U.S.C. §412.

Navarro v. Gannon, 385 F.2d 512, 518 (2d Cir. 1967), cert. den. 390 U.S. 989 (1968), and that the rights of free expression and political participation would be carefully protected. Suspension of the right to attend membership meetings and to attempt there to sway the minds of fellow union members seems clearly incompatible with the notion that freedom of speech within the union is a right of paramount importance. It is certainly true that, in the instant case, plaintiffs have not been deprived of the right to run for union office or to attend Executive Committee meetings of the Local. Doubtless these are very important rights -- rights which plaintiffs have been diligent in exercising. However, the availability of alternative modes of punishment, such as fines, which do not impede the rights of expression; the fact that suspension from membership meetings can so easily be used as a means of censoring dissident views; the strong policy in favor of internal union democracy; and the plain language of the statute itself all lead this court to the conclusion that a union is prohibited by statute from imposing a punishment such as that imposed in the instant case. See Stachan v. Weber, 535 F.2d 1203 (9th Cir. 1976).

It is urged by the union that, if the L.M.R.D.A. be so construed, unions would be precluded from imposing a penalty which falls short of suspension or expulsion from membership, with its extreme social and economic consequences. Such a ruling, it is urged, would not, in the long run, inure to the benefit of union members. In response, it need only be noted (1) that unions are still free to impose a rather broad range of less draconian "other discipline", and (2) that if Congress finds this construction improper or obnoxious, it is free to clarify the terms of the statute itself.

The court does not rest its determination that the punishment should be enjoined merely upon the impropriety of teh specific mode of discipline, however, For the following reasons, the court is of the opinion that, despite the obvious care and consideration with which the most recent hearing was carried out, the plaintiffs nevertheless did not receive the "full and fair hearing" mandated by statute. The court comes to this conclusion reluctantly, because it is readily apparent that the I.L.G.W.U. went beyond the requirements of current law in seeking to ensure that plaintiffs received a fair hearing attended by extensive substantive and procedural safeguards. And the court is certainly mindful that repeated disciplinary hearings over a substantial period of time constitute a drain on both the manpower and financial resources of a union. However, plaintiffs are also entitled to all the "due process" which is implicit in the statutory guarantee of a "full and fair hearing."

The defect in the hearing before the Special Appeal Committee was in the notice afforded to plaintiffs of its pendency. It is, of course, well settled that the provisions of 29 U.S.C. §411(a)(5) import a requirement that an accused union member have adequate notice of the charges against him and an opportunity to be heard in opposition thereto before any disciplinary action is taken. See, e.g., Krulikowsky v. Metropolitan District Council of Philadelphia and Vicinity, 212 F.Supp. 338, 340 (E.D.Pa. 1962). In the instant case, unlike many cases where the notice concept is in controversy, there is no question that plaintiffs received adequate warning of the specific charges against them, and that the charges were sufficiently concrete that they could be effectively defended against. The prob-

lem in this case is whether plaintiffs received adequate notice of the nature of the proceeding to be held on the charges. Specifically, the question is whether plaintiffs were adequately informed that the Special Appeal Committee would be holding a de novo trial on the charges, rather than an appeal from the earlier decision of the Local 10 Trial Committee.

The December 14, 1976 Decision of the Executive Committee of the GEB and the succeeding correspondence between that body, the Special Appeal Committee, and the plaintiffs is certainly susceptible of the inference that the new hearing was to be an appellate hearing. For instance, the letter of December 14, which forwarded the Decision to plaintiffs spoke of action "in connection with [their] appeal"; the Decision itself indicated that "the appeal from [Dolgen's charges] shall be heard and determined by a Special Appeal Committee...", that "[t]he appeal from the Trial Committee's decision ... shall be a hearing de novo by the Special Appeal Committee", that "[t]he minutes of the de novo appeal hearing" were to be taken by a shorthand reporter, and that an appeal from the determination of the Special Appeal Committee would be taken directly to the next convention - a procedure which, under the I.L.G.W.U. constitution, is reserved for appeals from appellate decisions of the GEB Appeals Committee. Moreover, the letter from the Secretary of the Special Appeal Committee to plaintiffs dated February 28, 1977 advised them that that body would hold a "hearing de novo on the appeal from the Trial Committee's decision of January 29, 1976" in accordance with the conditions set out in the December 14 decision of the Executive Committee of the GEB.

It is certainly true that there were some clues in those documents that the "hearing" would be a trial rather than an appeal.[23] For instance, the December 14 Decision provided that "[t]he accused and the charging party shall have the right to be present in person and/or by lay counsel in the manner provided in the I.L.G.W.U. Constitution...." The only reference to such a right in the constitution is in Article 22, Section 3, which deals with trial, rather than appellate procedures. However, the union certainly referred to the proceeding primarily as an appeal. And it seems clear that plaintiffs regarded it as an appeal as well. Their letter of March 14, 1977 to the Secretary of the Special Appeal Committee, besides accusing that body of harassment and retaliation, made clear their position that they had, by their previous appearnce before the GEB Appeal Committee in April of 1976, exhausted their intra-union appellate remedies as far as such pursuit was required as a precondition to suit in federal court.[24] Accordingly, they indicated that they would not attend the hearing.

Moreover, as previously indicated, the responsibe letter from the Secretary of the Special Appeal committee continued to refer to the forthcoming proceeding as an appellate hearing, although citing a section of the I.L.G.W.U. constitution pertaining to proceeding with trial in the absence of the accused. It is only in the letter to plaintiffs of

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[23] The mere fact that the hearing was to have been "de novo" and that witnesses would be heard afresh does not indicate that it was to have been an original trial, since appeals to the GEB Appeal Committee were ordinarily conducted in that manner. Affidavit of Sol C. Chaikin, sworn to September 14, 1976, at p. 4.

[24] 29 U.S.C. §411(a)(4).

April 11, 1977 that the Secretary of the Special Appeal Committee first refers to the then-completed hearing as a de novo trial.

Since it is perfectly clear that plaintiffs were notified that some kind of de novo hearing was to be held on the charges against them, it almost appears hypertechnical to make the validity of that carefully and conscientiously planned proceeding turn upon the choice of the term "appeal" instead of "trial" in the notice afforded thereof. However, in the context of the peculiar procedural posture of the litigation in this court, it made a considerable difference whether the I.L.G.W.U. was preparing to hold a trial or appellate hearing. As previously noted, this court had previously enjoined both the Local and the I.L.G.W.U. from giving any force or effect to the January 1976 decision of the Local 10 Trial Committee. Therefore, plaintiffs would have been justified in taking the position that they had no obligation to attend any appeal hearing, which would, arguably, have been in violation of this court's order. And any affirmative decision taken in their absence arguably would have been of no legal force or effect, notwithstanding the provisions of Article 22, Section 4 of the I.L.G.W.U. constitution.[25] On the other hand, nothing in the court's prior Memorandum Opinion or Order cast any doubt upon the right of the defendants, by some mechanism, to retry plaintiffs on the same charges, if they were afforded the "full and fair hearing" mandated by the L.M.R.D.S. Thus, it would have been incumbent upon plaintiffs, if they wished to make their position on the charges known, to appear at any further original disciplinary proceeding and defend themselves. Alternatively, if,

[25] See 29 U.S.C. §411(b).

as they have since contended in this court, they truly feel that they ought not to be subjected to any further trials by the Local, then, given clear notice of such a new trial, they would have had the opportunity to come into this court to seek injunctive relief against such further proceedings.

To inveterate litigators such as these plaintiffs, therefore, it made a considerable difference whether they were being notified of a trial or an appeal. The union's failure to make clear that the new hearing being contemplated was a trial rather than an appeal deprived plaintiffs of adequate notice of the hearing leading to the challenged suspension. The lack of notice and the subsequent trial in their absence violated their rights under 29 U.S.C. §411(a)(5), and the suspension resulting therefrom must be enjoined.

It might be argued, of course, that plaintiffs could have inquired of the union to find out whether the proposed hearing was to be a trial or an appeal. While it is by no means apparent that plaintiffs had any reason to suspect that the hearing was to be anything but an appeal, the law seems clear, however, that the onus is upon the union to provide adequate notice and there is no duty upon the accused to make such an inquiry. Nor would it have been sufficient for defendants to show, after the fact, that plaintiffs had independently obtained knowledge that the hearing was to be a trial. See Berg v. Watson, 417 F.Supp. 806, 811 (S.D.N.Y. 1976); Magelssen v. Local Union No. 5118, Operative Plasterers and Cement Masons' International Association, 233 F. Supp. 459, 461 (W.D.Mo. 1964).

Plaintiffs also argue that the challenged discipline should be set aside on the additional ground that the GEB was without authority to establish a committee of its own members to hear and determine charges made by one member of a local against another member. Although, strictly speaking, the court need not pass upon this argument since it has voided the trial and punishment on other grounds, it will do so to lay to rest this argument, should the parties choose to continue this litigation further. The argument is without merit.

Briefly stated, plaintiffs' argument is that since Article 21, Section 3 of the I.L.G.W.U. constitution explicitly requires that the grievance committee of an unaffiliated Local shall initially try charges made by one member of the local against another; since other sections of the constitution explicitly vest the GEB (or its Appeal Committee) with authority to conduct original trials of certain kinds of charges; and since nothing in the constitution explicitly gives the GEB authority to set up any special trial committees, the GEB is without any authority under the consittution to establish the sort of committee which purported to try the charges against plaintiffs in March of 1977.

In response, the I.L.G.W.U. asserts that the GEB has the requisite authority to establish a special committee to conduct such a trial. It notes that Article 3, Section 8 of the constitution gives the GEB "general supervisory powers over all the affairs of the I.L.G.W.U. and its subordinate organizations, including the right to ... (d) make rules for the government of the ILGWU and its subordinate organizations which are not inconsistent with this constitution and

take such other action as it believes may be required for the welfare of the ILGWU and such organizations; [and] ... (h) appoint any committee or sub-committee it deem necessary to perform specified duties...." Moreover, the union notes that, under Article 3, Section 8(c), the GEB has the right to "decide all questions involving the interpretation of this constitution..." and that, under Article 3, Section 7, the Executive Committee of the GEB has all the powers nad duties of the full GEB between sessions. Thus, the union argues, the Executive Committee, in its Decision of December 14, 1976, interpreted the I.L.G.W.U. constitution to vest in the GEB a power to conduct original trials such as the one here at issue. Moreover, the full GEB ratified the Executive Committee's interpretation at its meeting on February 16, 1977, and the full triennial convention of the I.L.G.W.U. in turn ratified that interpretation in May of 1977.

Plaintiff urges the applicability of the maxim inclusio unius est exclusio alterius, arguing that the provision for trial of such charges by the local's grievance committee necessarily implies that such charges are not to be heard by other bodies. On the other hand, the I.L.G.W.U. stresses the "plenary" nature of the grant of authority to the GEB found in Article 3, Section 8.

This court deems it inappropriate to make its own determination of this interpretive question, however, for the reason that "[c]ourts are reluctant to substitute their judgment for that of union officials in the interpretation of the union's constitution, and will interfere only where the official's interpretation is not fair or reasonable."

Vestal v. Hoffa, 451 F.2d 706, 709 (6th Cir. 1971), cert. denied, 406 U.S. 934 (1972); accord, English v Cunningham, 282 F.2d 848 (D.C. Cir. 1960). The court cannot say that the interpretive judgment of the GEB was so lacking in basis as to warrant judicial re-examination and reversal. Particularly in a situation in which plaintiffs themselves are now arguing that they can no longer receive a fair trial at the local level after three prior disciplinary proceedings in a Local in which they are prominent members of the opposition, the court can certainly see a reasonable basis for a constitutional construction which seeks to find an escape from that impasse which is fair to both charging party and accused. Certainly the GEB could conscientiously seek to find a new and, hopefully, impartial tribunal to bring an end to intra-union litigation acquiring a certain degree of notoriety. The GEB's itnerpretation, while not necessarily that which the court might make, was certainly reasonable and proper. As such, it will not be disturbed.

Plaintiffs' fourth and final ground for issuance of the injunction is that the imposition of the suspension by the Decision of the Special Appeal Committee constitutes double punishment for the offense charged, in that the Trial Committee's January, 1976 suspension is still extant, although defendants are enjoined from enforcing it. This argument is totally frivolous. As previously indicated, nothing in the court's prior pronouncements cast any doubt upon the defendants' right to retry plaintiffs on the same charges, so long as they received a full and fair hearing on the charges. Indeed, the Decision of the Special Appeal Committee, while imposing suspensions of the same duration as those previously imposed by the Trial

Committee, reduced those periods by the amount of time that the Trial Committee's order had been outstanding before its enforcement was enjoined by the court. There has been no double punishment and, in the absence of any showing of bad faith enforcement of the union rules, there is nothing in this opinion which necessarily bars a procedurally correct new trial.

The above discussion is dispositive of the request for injunctive relief concerning the discipline imposed by the "Special Appeal Committee", and also of the motion to file a supplemental complaint, since the allegations contained therein are of some substance. This disposition, along with the court's previosu injunction concerning the January 1976 suspension order, obviously renders unnecessary any further discussion of the plaintiffs' previosu requests for injunctive relief. However, as indicated previously, their two complaints also seek awards of compensatory and punitive damages. Thus, consideration of defendants' various motions to dismiss and of plaintiffs' cross-motion for summary judgment, is still necessary.

Dolgen's Motion to Dismiss

Based upon the facts alleged in the first complaint, i.e., through September of 1975, Dolgen, sued as an individual, has moved to dismiss the federal claim against him for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.[26] This motion is granted.

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[26] Due to the fact that the motion is accompanied by affidavits, it will be treated as a motion for summary judgment. Rule 12(b).

The complaint is not a model of clarity and it is often difficult to perceive which of the alleged acts of Dolgen were assertedly performed in his capacity as an individual, rather than in his capacity as an officer of Local 10. However, the essential allegations seem to be, first, that he deliberately filed false charges against the plaintiffs in an effort to inhibit them from exercising their rights under the L.M.R.D.A.; and, second, that he "maliciously" interfered with and manipulated the actions of the trial body at the first two trials in a successful effort to obtain disciplinary action against plaintiffs.

The legal question is whether these allegations state a claim under the L.M.R.D.A. One very clear line of authority holds that they do not. In what has become the leading case on the subject, the Court of Appeals for the Third Circuit carefully considered the legislative history of Title I of the L.M.R.D.A. to determine whether that legislation "regulates the conduct of private individuals not acting as agents or representatives of any labor organization." Tomko v. Hilbert, 288 F.2d 625 (1961). The court's conclusion was that "the LMRDA does not provide a civil remedy for the vindication of rights contained in the bill of rights against one who in violating such rights is not acting in the capacity of an official or agent of a labor union." 288 F.2d at 625-6. "Private misconduct which incidentally may frustrate appellant's rights as a union member does not give rise to an action under the bill of rights section." 288 F.2d at 629. This case has been followed, for example, in Cox v. Hutcheson, 294 F.Supp. 442 (S.D. Ind. 1962) (filing of false union charges by an individual) and in Cole v. Hall, 35 F.R.D. 4 (E.D.N.Y. 1964) (conspiracy to deprive a member of his union rights).

In rebuttal, plaintiff has cited two cases in which recovery was apparently allowed against an individual acting in a private capacity, for allged violations of the LMRDA. In Sands v. Abelli, 290 F.Supp. 677 (S.D.N.Y. 1968) disciplinary charges had been filed against the original plaintiff, Solomon Salzhandler, by Isadore Webman, president of the local union. Salzhandler was tried on those charges by the union trial body (of which Webman was not a member) and suspended. He then sued the union and Webman, recovering punitive damages from both. However, it is not clear in the opinion whether the damages were being recovered from Webman in his private or official capacity, as the court does not discuss the issue.[27] In view of the

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[27] In any event, the District Court was merely carrying out the mandate of the Court of Appeals which had reversed an earlier decision and directed entry of judgment for the plaintiff, remanding the case to the District Court for assessment of damages and entry of an injunction. Salzhandler v. Caputo, 316 F.2d 445, 451 (2d Cir.), cert.den. 375 U.S. 946 (1963). The Court of Appeals had not considered the question of Webman's individual liability under the LMRDA. The Court merely reversed a previous dismissal of Salzhandler's complaint, holding that "the LMRDA protects the union member in the exercise of his right to make /charges of impropriety by unionofficers/ without reprisal by the union; that any provisions of the union constitution which make such criticism, whether libelous or not, subject to union discipline are unenforceable; and that the Act allows redress for such unlawful treatment." 316 F.2d at 446.

fact that counsel fees were later assessed against Webman "as President of Local 442", however, it seems more likely that his liability was official rather than individual.

Plaintiff also cites Robins v. Schonfeld, 326 F.Supp. 525 (S.D.N.Y. 1971). In that case, the plaintiff, who had been wrongfully punished by the union District Council, sued the Council, the Local and Thomas Guinta, the president of the Local, who had brought the charges against the plaintiff. Guinta was not found liable as an individual for lack of proof, but was assessed attorney's fees. The court did not discuss the distinction between Guinta's liability as an individual and as a union officer.

In view of the fact that the cases which have carefully considered the question whether an individual - not acting in an official capacity - may be found liable for a violation of the LMRDA have uniformly and persuasively concluded that he may not, the court does not find the Sands and Robins cases persuasive. Accordingly, insofar as the complaint seeks to hold Dolgen, in his unofficial capacity, liable for damages due to alleged violations of the LMRDA, it must be dismissed.

However, Dolgen is sued in his capacity as Manager of Local 10, as well, and the law is clear that individual defendants may be held liable under the L.M.R.D.A. if their improper acts are done under color of union authority. Morrissey v. National Maritime Unionof America, 544 F.2d 19, 24 (2d Cir. 1976). Because (a) the complaint does not make clear precisely which actions Dolgen is alleged to have taken in his official capacity, and because (b) the facts surrounding his attendance and/or

participation in the first two disciplinary trials (at which he is apparently alleged to have acted officially) are in dispute, the motion to dismiss the complaint against him as Manager of the Local must be denied. See Stein v. Mutel Clerks Guild of Massachusetts, 384 F.Supp. 444, 448-9 (D.Mass. 1974).

Befor any further discussion of the various motions to dismiss, it is useful to summarize plaintiffs' claims under the LMRDA as gleaned from the two suits.

First, they assert that all the punishment thus far imposed upon them, i.e., fromk the second trial (as upheld by the July 1975 appeal), the third trial (by the Local 10 Trial Committee in January 1976) and the hearing before the Special Appeal Committee of the GEB, are facially invalid as being inconsistent with their rights as union members. For the reasons set forth supra, the court agrees. The discipline in all three instances contains the common element of suspension from participation in general membership meetings.[28] Therefore, plaintiffs are entitled to summary judgment on this issue.

Second, they assert that they were denied a "full and fair hearing" at the first two trials in that (a) Dolgen, the charging party, allegedly chaired the hearing or otherwise "manipulated" the trial body, (b) they were denied the right to make their own stenographic or tape recorded record of the proceeding, (c) they were denied the right to examine the "official" minutes after their trials by Local 10 in

[28] Although, as noted supra, the first suspension included participation in all union activities.

order to prepare for their appeals, and (d) the trial body was biased and prejudiced against plaintiffs, particularly when, at the second trial, they had allegedly prejudged plaintiff's guilt since they had already found them guilty at the first trial.

Third, they assert that, with respect to the third trial, they were denied a full and fair hearing in that (a) they were not provided with copies of the official minutes of the two previous trials in order to prepare for the third trial, (b) they were not permitted to make their own record of the proceedings with a tape recorder, (c) the trial was "arbitrarily and without good reason" conducted in their absence, and (d) the trial committee failed to "make or have made an accurate stenographic or other record of the proceedings."[29]

Fourth, they assert that the charges against them were "false" and that the discipline imposed upon them with relation thereto is invalid and an illegal means of retaliation against them for their expression of dissident views.

Those claims which are not yet resolved

[29] Paragraph 18 of the second complaint alleges that "/d/espite demands made by plaintiffs, the trial committee further failed to make or to have made an accurate stenographic or other record of the proceedings." This allegation clearly asserts an obligation of the union to prepare some sort of record, rather than the right of plaintiffs to have a record of their own prepared, presumably at their own instance and expense. Although plaintiffs have not subsequently sought to support this position, it remains in the complaint and the court will assume that it has not been abandoned.

and which remain necessary for disposition will be dealt with infra. However, it is appropriate at the outset to dispose of the contention made by Local 10 that the decision of the I.L.G.W.U.'s General Executive Board in October 1975, remanding the charges for a third trial, rendered the federal claims of the first complaint moot. As previously indicated, plaintiffs sought not only injunctive and declaratory relief, but also damages for injury to reputation and mental suffering, which are clearly compensable elements of damages. See Simmons v. Avisco, 350 F.2d 1012, 1019-20 (4th Cir. 1965). The conclusory affidavits submitted by the Local are clearly insufficient to establish that no such damages were, in fact, sustained. That is an issue for trial, and the plaintiffs' federal claims are not entirely moot.

Exhaustion

In both actions, Local 10[30] and the ILGWU have sought to dismiss the federal claim on the ground that plaintiffs failed to exhaust their remedies within the union structure. These motions were made prior to the creation of the Special Appeal Committee, and the subsequent disciplinary proceeding berore that body. Since plaintiffs carried their appeal from the resulting decision to the triennial convention of the I.L.G.W.U. -- the highest level of appeal permitted by the union constitution -- it is clear that the issues relative

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to that "special" proceeding have been adequately presented to the ILGWU for internal consideration prior to the filing of the supplemental complaint covering the events subsequent to July of 1976.

However, the question remains whether plaintiffs prematurely instituted the two basic actions at issue in this case.

The statutory requirement[31] that union members be required to exhaust "reasonable hearing procedures" within the union for a four-month period prior to instituting legal action against the union or its officers is a discretionary one. Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2d Cir.), cert. denied, 366 U.S. 929 (1961) and is subject to some clearly recognized exceptions. Most pertinent in this case is the principle that exhaustion is not required where further intra-union appeals would have been futile. Farowitz v. Associated Musicians of Greater New York, 330 F.2d 999 (2d Cir. 1964).

With respect to the allegations of impropriety concerning the first two trials (contained in the first complaint filed in September of 1975) the court is clearly of the view that plaintiffs adequately exhausted their union appeals before bringing suit. In each case, they perfected their appeals to the Appeal Committee of the General Executive Board of the ILGWU. In each case, a decision was rendered by the Committee. As previously indicated,[32] the only appeal of right from a decision of the Appeal Committee is to the next convention of the parent union which, in

[31] See note 24, supra.

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31 See note 24, supra.

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this case, was scheduled for May of 1977 -- a period clearly beyond the four-month waiting period required by the statute. While the full GEB may, on its own motion, review determinations of the Appeal Committee, such a review is obviously discretionary with the GEB and it would not be reasonable to require aggrieved union members to await a review to which they are not entitled, and which they might not receive at all. The fact that the second appeal in this case was, in fact, reexamined and vacated by the full GEB -- a month after teh first suit was instituted -- is purely fortuitous.

A somewhat more difficult question is presented by the allegations of impropriety concerning the third trial, conducted on January 8, 1976, which are contained in the second complaint. As previously indicated, plaintiffs took a timely appeal to the GEB Appeal Committee which first met to hear the appeal on April 8, 1976 -- a bit over two months after the Trial Committee rendered its decision against plaintiffs. The ostensible reason that the appeal was never heard was that plaitniffs refused to abide by the ruling of the Appeal Committee that they must not tape record the proceedings. The ILGWU argues, naturally enough, that plaintiffs frustrated the hearing of their own appeal by their obstreperous refusal to abide by the procedural rules establshed by the Appeal Committee. Plaintiffs argue that the Committee's refusal to proceed to hear the appeal was arbitrary and unwarranted.

This court obviously has no desire to impede enforcement of the union's procedural rules or to enable union members to

side-step union appeals and make an end run for federal court whenever it suits their purposes. However, in this case, the court is convenced that the purposes underlying the exhaustion rule were duly served by plaintiffs' intra-union appeals prior to institution of the second federal action. See Detroy, supra, at 79. The GEB Appeal Committee had, on the second appeal, made clear, inter alia, that, in its view, there was sufficient evidence to support the charges against plaintiffs, and also that plaintiffs were not entitled to tape record the appeal. Thus, there was little likelihood that the third appeal would render the case moot, and the Committee had already rendered a decision on the main outstanding procedural issues (notably the tape recording issue) and has set forth its reasons therefor. As subsequent events in this case have shown, further judicial insistence on pursuit of the union appeal would not have resulted in an alteration of the Appeal Committee's position on the salient issues -- on which it was at loggerheads with plaintiffs. Nor would pursuit of the appeal have provided further enlightenment for this court, or resulted in anything more than a repetition of appeals previously held on issues previously determined. Accordingly, the court holds that plaintiffs' failure to continue with the third appeal (in April of 1976) and to again press their substantive and procedural points in the union forum is not a bar to institution of the second action in this court.[33]

33 It is noteworthy that, in an affidavit subsequently submitted to this court, President Sol C. Chaikin of the I.L.G.W.U. has stated, pursuant to his constitutional authority to interpret the union's constitution, that plaintiffs' failure to abide by the prohibition against tape recorders or stenographers at trials or appeals would authorize the trial or appellate body to determine the charges against them in their absence. Thus, the GEB Appeals Committee could have proceeded with plaintiffs' appeal despite their refusal to attend without a tape recorder. The court's action in entertaining the second suit in no way prevented the Appeal Committee from ruling on plaintiffs' appeal if they had wished to do so.

The I.L.G.W.U. strenuously asserts that plaintiffs failed to exhaust their intra-union remedies against the parent union in that they never filed charges against the GEB, as provided by Article 21, Section 12 of the union constitution. However, charges against the GEB are referred to the I.L.G.W.U.'s convention, which was not scheduled to meet for over a year after plaintiffs reached their deadlock with the Appeals Committee. Since the statute requires that they exhaust reasonable hearing procedures only for a period of four months, it clearly would have been a futile gesture for them to have instituted charges which could not be determined within that period.

Denial of a "Full and Fair Hearing" at the First Three Trials

The court does not find it necessary to discuss each and every allegation of impropriety concerning the three trials held at the Local level, and the first two appeals, for it holds that, on two separate grounds, plaintiffs were denied the full and fair hearing required by 29 U.S.C. §411(a)(5).

Plaintiffs claim that they were denied a full and fair hearing in that they were not permitted to make either a tape recorded or stenographic record of the trials and appeals for their own use. The court agrees. Although the parties are in dispute as to whether plaintiffs ever requested to bring a stenographer, as opposed to a tape recorder, the August 20, 1976 affidavit of Nat Klein, Secretary of the Local 10 Executive Board, makes clear that Local 10 would not have permitted them to bring a stenographer in any event, even at their own expense. Moreover, the September 14, 1976 affidavit of the President of the ILGWU indicates that a similar policy would have applied to hearings before the GEB Appeal Committee. Accordingly it appears immaterial to the court whether plaintiffs ever formally asked to bring a stenographer or not.

With respect to the tape recorder, the Local's position is clear and was made clear to the parties during the litigation. In the Local's view, tape recordings are subject to manipulation, splicing, and erasure, and are therefore susceptible to the efforts of disgruntled and unscrupulous litigants who may endeaver to distort the record of the proceedings.

More generally, the union objects to the presence of either tape recorder or a stenographer brought by the parties on two principal grounds. First, the Local urges that union disciplinary proceedings are conducted informally by laymen and should not be overlaid with the formalisms which might attend a criminal trial in courts. Secondly they argue that Article 22, Section 2 of the ILGWU constitution,[34] which makes provision for the official minutes of such hearings, implicitly prohibits the accused from making such a record for himself (although the accused would be free to take his own hand-written notes of the proceedings). As construed by the GEB Appeal Committee,[35] this provision dealing with the official, non-verbatim record of the proceedings precludes the accused from making what is, at least potentially, a more complete and accurate record of the proceedings at his own expense. The Local urges that the opportunity always afforded the accused at his appeal to comment upon the accuracy of the official minutes of the trial provides a sufficient opportunity for the accused to ensure that the minutes accurately reflect the substance of the hearing.

The court has been cited no authority which has gone so far in importing the concepts of due process as to hold that it is incumbent upon the union to provide a stenographer (or other verbatim recording mechanism) in order to afford an accused union member a "full and fair hearing". But see Deacon v. Operating Engineers, Local 12, 59 LRRM 2706, 2707, 2709 (S.D.Cal. 1965). One court has explicitly held that the use of a court reporter is not a necessary element of a full and fair hearing.[36] Kiepura v.

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[34] "The secretary of a grievance, trial or appeal committee shall file the minutes of all trials and appeals in the office of the union of which it is a part."

[36] See note 6, supra.

[37] It is worthy of note that Congress rejected a version of Section 101(a)(5) of the L.M.R.D.A.,

Local Union 1091, United Steelworkers of America, 358 F.Supp. 987, 992 (N.D.Ill. 1973). Particularly in the circumstances of this case, the court need not go so far as to require the union to provide a stenographer or tape recorder in every case. Especially in view of the expense of providing competent stenographic service, such a holding would impose a substantial burden upon a union's resources, and could fundamentally change the relatively informal adjudicatory processes which unions have traditionally be allowed to employ.

However, it ss quite another thing to hold, as does this court, that the Local denies the accused a full and fair hearing when it precludes him from either tape recording the hearing or providing a competent stenographer at his own expense to make a record for his own purposes, whatever they may be. The union is free to continue to regard the nonverbatim minutes taken by the Secretary of the trial body as the "official" minutes of the proceeding. If an accused is sufficiently concerned about the accuracy of the official minutes that he is willing to either bring a tape recorder or a competent stenographer at his own expense, however, the court can perceive no reason why a union should not allow the accused to do so, unless it is, in fact, attempting to conceal inaccuracies in its own minutes. Although the Local argues that a stenographer em-

29 U.S.C. 411(a)(5), sponsored by Senator McClellan, which would have explicitly required a written transcript of any disciplinary hearing. Department of Labor, Legislative History of the Labor Management Reporting and Disclosure Act of 1959, p. 248.

ployed by the accused might wilfully falsify the record, the court does not deem this contention worthy of serious discussion. And, while it is certainly true that tape recordings can be manipulated and are often unintelligible when several persons are speaking at once, the union, if it suspects that a recording is not accurate, can have such a recording electronically tested to determine whether it has been tampered with, and can have its own transcript prepared from the recording.

As for the contention that the opportunity to correct the minutes on appeal provides a sufficient guaranty of their accuracy, it seems obvious to the court that such a right could be illusory when the challenged minutes can only be compared with the accused's own nonverbatim, handwritten notes of the proceedings. If the accused can provide his own tape recording or transcript of the proceedings, it would seem much more likely that an appellate body would be receptive to allegations of impropriety concerning the record prepared by the tiral body.

It may be argued, of course, that if accused union members invariably avail themselves of the opportunity to make their own record of the proceedings, then the result will be pressure upon the union to make its own verbatim record -- with attendant expense -- to protect itself and ensure the accuracy of the accused's record. While that conceivably could be the case, that is a result dictated by teh union's own prudence, rather than by a holding of this court that the LMRDA requires it to do so. However, it seems unlikely that accused union members would, in the majority of cases, be so suspicious of the good

faith of the trial bodies and the accuracy of the hearing minutes as to go to the trouble of making their own record.

In holding that Local 10 and the ILGWU denied plaintiffs a full and fair hearing by denying them the right to make their own record by tape recorder or stenographer, this court merely makes explicit what the court circuitously did in the Kiepura case, supra. That court refused to hold that "the use of a court reporter is a necessary element of a 'full and fair hearing!", but it did hold that, in the circumstances of that case, the union's refusal to allow the plaintiff to supply a court reporter at his own expense was "an abuse of discretion which did tend to deprive him of such a hearing." 358 F.Supp. at 992. This court can perceive no reason why such a refusal should be couched in terms of "abuse of discretion" rather than in terms of deprivation of a full and fair hearing.

Plaintiffs further contend that they were denied a full and fair hearing by Local 10 at the second trial in that the Executive Committee of the Local which retried them was composed of many[37] of the same individuals who had tried them the first time, and who had thereby necessarily prejudged them guilty. Thus, they argue, they were deprived of the impartial tribunal which is a requisite of a full and fair hearing. Stein, supra. For purposes of ruling upon this contention, the

[37] The December 19, 1975 affidavit of Nat Klein, Secretary of the Local 10 Executive Board makes clear (at page 12) that there was some overlap in attendance of members of the Executive Board between the two trials.

parties are in agreement that there was some overlap of attendance between the two meetings of the Executive Board.

This contention does not present a legal issue of first impression. It is well established that an accused union member is not afforded a full and fair hearing if a member of the tribunal trying him has prejudged his guilt. Falcone v. Dantinne, 420 F.2d 1157 (3rd Cir. 1969). That principle has led at least one court to hold that a second trial by a tribunal of which only one of three members had previously sat at a previous trial and there adjudged the accused guilty is sufficiently unfair as to violate the accused's right to a fair hearing. Cefalo v. Moffett, 78 LRRM 2112 (D.D.C. 1971).

This court agrees that plaintiffs did not receive a fair hearing at the second trial. Particularly in view of the fact that the GEB Appeal Committee had already (on the first appeal) expressed its view that there was adequate evidence to support a finding of guilty, it seems unreasonable to suggest that a committee of laymen could view the charges, which they had already considered, with a completely open mind. Certainly no criminal charges are ever remanded to the same jury for a second trial. The opportunity to be tried before an unbiased tribunal is so fundamental that its absence renders any hearing unfair. Under the circumstances of this case, plaintiffs did not receive a fair hearing at their second trial by the Local. Accordingly, the provision of the ILGWU constitution authorizing retrial before the same tribunal[38] is, as applied here, inconsistent

[38] See note 4, supra.

with federal law and void.[39]

The Allegation of "False" and Improperly Motivated Charges

As indicated above, plaintiffs allege that the charges against them were "false" and that the discipline imposed upon them with relation to the charges is invalid because it was an illegal means of retaliation against them for expression of dissident views.

The scope of judicial review of union disciplinary hearings under 29 U.S.C. §411 (a)(5) is strictly limited. The court must determine whether there was "some evidence" to support the charges made. International Brotherhood of Boilermakers v. Hardeman, 401 U.S. 233, 246 (1971). Accord, Burke v. International Brotherhood of Boilermakers, 302 F.Supp. 1345, 1350 (N.D.Cal. 1967), aff'd 417 F.2d 1063 (9th Cir. 1969). "A stricter standard ... would be inconsistent with the apparent congressional intent to allow unions to govern their own affairs, and would require courts to judge the credibility of witnesses on the basis of what would be at best a cold record." Hardeman, supra, at 246. For purposes of evaluating whether plaintiffs received a "full and fair hearing", the motive of the accuser in bringing charges is irrelevant, as long as the charges are supported by the evidence. Burke, supra, at 1353; Pittman v. United Brotherhood of Carpenters & Joiners, 251 F.Supp. 323, 324 (M.D. Fla. 1966).[40]

[40] Leonard v. M.I.T. Employees' Union, 225 F. Supp. 935 (D.Mass. 1964), is not to the contrary. Although the court does say that "... these charges were only a pretext and the real purpose of the board was to get rid of Leonard because he was an opponent and critic of the union officers and their policies", 225 F.Supp. at 939, the basis of the court's holding that the plaintiff's expulsion was unlawful was its finding that the charges were not supported by any "substantial evidence". Id.

The charges, on their face, allege conduct, to wit, engaging in a sit-in, disrupting union operations, and inciting violence, which, if proven, could properly be the subject of union disciplinary action whatever its political aim. Cf. Gulickson v. Forest, 290 F.Supp. 457 (E.D.N.Y. 1968) (plaintiff disciplined for what he did, not what he said or wrote).

If there was evidence before the disciplinary tribunals which could support these charges, the court need not inquire into the motivation for their filing as part of its inquiry whether plaintiffs received the full and fair hearing mandated by 29 U.S.C. §411(a)(5)(C). Burke, supra, at 1353.

It is clear that the allegation that the charges preferred against plaintiffs were "false", i.e., totally unsupported, states a claim against Local 10,[41] which

[41] Although plaintiffs do not, in their second complaint naming Local 10 as a defendant, allege that the charges were "false", they do allege that the punishment was imposed upon them in retaliation for their exercise of rights guaranteed by the L.M.R.D.A. Presumably, in view of the allegations of the first complaint, of which the second is really a continuation, plaintiffs continue to imply that the charges are "false" at the third trial which is the subject of that complaint.

adjudicated the charges.[42] See Leonard v. M.I.T. Employees Union, 225 F.Supp. 937 (D.Mass. 1964). In seeking to definitively rebut that allegation, the Local has submitted multiple affidavits purporting to establish that the charges were factually grounded, and that the punishment was supported by evidence presented to the various trial bodies. While the version of the incident in Dolgen's office set forth in these affidavits is at variance in many respects with that offered by plaintiffs in their affidavits, this disparity was clearly for the union's trial body to resolve, and is not subject to de novo re-examination by this court. Hardeman, supra. Accordingly, even in the presence of some factual dispute, there was clearly "some evidence" to support the finding of the Local's disciplinary body, and the Local is entitled to a summary judgment that the trials were not thereby "unfair."

Plaintiffs allege, of course, not only that they were denied a full and fair hea-

[42] For the reasons stated supra, the allegation does not state a claim against defendant Dolgen, as a union member, for pressing the charges. Although the Local itself is not named as a defendant in the caption of the first action, plaintiffs do refer, in their complaint and elsewhere, to "defendant Local 10". Thus the court will assume that that omission was a pleading error. Moreover, since Dolgen is also named in the caption as Manager of Local 10, it is perhaps unnecessary to name the Local as a defendant. See Cole v. Hall, supra, at 7:("It is true that he does not mention the Union as a party but since he sues the officers in their representative capacity, it is unnecessary for him to specifically designate the Union as a defendant.)

ring under 29 U.S.C. §411(a)(5)(C), but also that the motivation of the various trial bodies in imposing the discipline was to inhibit their expression of dissenting views, in violation of 29 U.S.C. §529, a statutory section whose application frequently requires a motivational inquiry into all the circumstances surrounding the "discipline" in question. Broadly read, this allegation challenges the impartiality of the disciplinary tribunals and clearly states a claim under the LMRDA. See, e.g., Kuebler v. Cleveland Lithographers, 473 F.2d 359 (6th Cir. 1973); Stein, supra. However, despite a plethora of affidavits attesting to the honesty and good charactaer of the members of the Executive Committee and Trial Committee of Local 10, the responsive affidavits submitted by plaintiffs raise factual issues which are not susceptible of summary determination. Defendants' motion for summary judgment on the Section 529 claim must be denied.

Plaintiffs' Second Cause of Action in the First Suit

As indicated supra, plaintiffs' first complaint included a second cause of action, denominated an action for "false arrest and malicious prosecution", against Dolgen and the City of New York.

The claim is pleaded against the two defendants in the alternative. First, plaintiffs allege that Dolgen, on January 29, 1975, caused certain New York City police officers to arrest plaintiffs Rosario and Vega and take them into custody, without "just or lawful cause", that he further "falsely instructed" the police that he intended to press criminal charges

against Rosario and Vega; that Rosario and Vega were consequently held in police custody for over five hours and were, against their will, "subjected to many and various personal indignities by such police officers"; and that, because Dolgen caused a summons to be served upon Rosario and Vega on or about January 29, 1975, they subsequently appeared in Criminal Court in response thereto and were required to remain in court for more than four hours.

Alternatively to the allegation that Dolgen caused the police to arrest the two plaintiffs, they allege that certain police officers arrested them, without being instructed to do so by any complainant and without probable cause to believe that they had committed any criminal offense or violation.

As a claim for malicious prosecution, the second cause of action is defectinve in that it fails to plead that the criminal proceeding against the plaintiffs was terminated in their favor, Broughton v. State of New York, 37 N.Y.2d 451 (N.Y.), cert. denied sub nom. Schanbarger v. Kellogg, et al., 423 U.S. 929 (1975).

Indeed, the complaint does not specify what, if anything, transpired at the Criminal Court. However, the complaint does state a claim for false arrest (or false imprisonment) against both Dolgen and the City. See Broughton, supra.

Although the complaint does state this cause of action, the further question arises whether this claim ought to be entertained by the court as properly within its pendent jurisdiction. Insofar as the City is concerned, it is now clear that there

is power in the federal courts to adjudicate state law claims against defendants who are not parties to the principal federal claims. Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971). Moreover, in the court's view, this state claim should be adjudicated in the same proceeding with the remaining questions under the L.M.R.D.A.

While the complaint must be dismissed against Dolgen in his private capacity, the lack of clarity in the complaint as to exactly which, if any, actions were taken by him under color of his union authority as Manager of the Local and the factual dispute concerning his role at the first two trials will require that that issue be resolved at trial.[43] Thus, Mr. Dolgen remains a defendant in this suit, although in his official capacity. To the extent that his good faith in exercicing his authority may become an issue bearing upon his federal liability, see Berg v. Watson, 417 F.Supp. 806, 812 (S.D.N.Y. 1976), it does seem entirely possible that evidence bearing upon the events constituting the state law claim may be both relevant and material to the federal claim as well. Since the additional increment of evidence necessary to adjudicate the claim against the City will be minimal, considerations of sound judicial administration lead to the conclusion that the false arrest claim should be tried jointly with the federal claim in this action.[44] Accordingly, the motions

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[43] Unless it is clarified on further motion practice.

[44] The fact that, as argued by counsel, the state claim arguably "arose" before the fede-

to dismiss the pendent claim are denied.

Summary

To reiterate, (1) 75 Civ. 4632 and 76 Civ. 3204 are ordered consolidated; (2) plaintiffs are entitled to a summary judgment (a) that the supsensionsimposed upon them are invalid and (b) that they did not receive a full and fair hearing at the first two trials by the Local and on the first two appeals by the GEB Appeal Committee in that they were nto allowed to make their own record of the proceedings and they were re-tried by the same tribunal; (3) the allegations that Dolgen, in his private capacity, violated the plaintiffs' rights under the L.M.R.D.A. are dismissed; (4) Local 10's motion to dismiss the claim under 29 U.S.C. §529 is denied; (5) the malicious prosecution claim is dismissed; and (6) plaintiffs' motions for a preliminary injunction and for leave to file a supplemental complaint are granted.

The following issues remain for disposition: (1) whether the discipline imposed by the disciplinary bodies of Local 10 was imposed by them in retaliation for plaintiffs' exercise of protected rights under the L.M.R.D.A.; (2) whether plaintiffs suffered any compensible injury which was the proximate result of their being wrongfully disciplined; (3) the amount, if any, of compensatory damages for any such injury; (4) whether Abe Dolgen, acting under color of and in abuse of his union office, contributed to the denial of plaintiffs' L.M.R.D.A. rights and, if so, what proportion

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ral claim "arose" is by no means dispositive of the pendent jurisdiction issue.

of plaintiffs' damages, if any, was due to his misconduct; (5) whether an award of attorneys' fees is appropriate on the L.M.R.D.A. claim and, if so, the amount thereof; (6) whether defendants Dolgen and the City of New York are liable to plaintiffs Rosario and Vega under state law and, if so, what is the amount of plaintiffs' compensatory damages thereunder; (7) the assessment of punitive damages, if appropriate.

Endorsed Order of January 11, 1978

ENDORSEMENT

Rosario v. Dolgen, 75 Civ. 4632
Rosario v. ALGCU, 75 Civ. 3204

The motion to amend the complaint is GRANTED since this technical amendment, though long-delayed, will not prejudice the defendant who has been on notice of the malicious prosecution claim since the inception of the suit.

The motion to reinstate Doglen as an individual defendant is disposed of as follows: The state law claims of malicious prosecution and false arrest may proceed against Dolgen in his personal capacity. In its opinion of November 14, 1977 the court never intended to dismiss the false arrest claim as to Dolgen as an individual.

The federal claims may proceed against Dolgen only in his official capacity.

Dated: January 11, 1978
New York, New York SO ORDERED

s/CONSTANCE BAKER MOTLEY
Constance Baker Motley, U.S.D.J.

Memorandum Opinion of April 6, 1978

In its opinion of November 14, 1977, the court considered Dolgen's motion to dismiss. At page 39 the court said,

> "In view of the fact that the cases which have carefully considered the question whether an individual -not acting in an official capacity- may be found liable for a violation of the LMRDA have uniformly and persuasively concluded that he may not, the court does not find the Sands and Robbins cases persuasive. Accordingly, insofar as the complaint seeks to hold Dolgen, in his unofficial capacity, liable for damages due to alleged violations of the LMRDA, it must be dismissed.
>
> However, Dolgen is sued in his capacity as Manager of Local 14, as well, and the law is clear that individual defendants may be held liable under LMRDA if their improper acts are done under color of union authority. Morrissey v. National Maritime Union of America, 544 F.2d 19, 24 (2d Cir. 1976).... (Emphasis added)

To clarify this portion of the court's earlier opinion, a portion of the Second Circuit's opinion in Morrissey, cited in the text of the opinion will now be quoted,

> "We find equally little merit in the argument that only the Union can be liable for a violation of §101(a)(2). The civil remedy for a violation of Title I rights is provided in §102.

> Nothing in its language indicates that only a labor organization may be sued. ... The few cases on point have held that §102 extends to suits against individual defendants, at least if it is shown that they were acting under color of union authority, Vincent v. Plumbers & Steamfitters Local No. 198, 384 F. Supp. 1379, 1384 (M.D.La.1974); Eisman v. Baltimore Regional Joint Board of Amal. Clothing Wrkers., 352 F.Supp. 429, 437 (D.MD.1972), aff'd, 496 F.2d 1313 (4th Cir.1974); Talavera v. International Bro. of Teamsters, 351 F.Supp. 155 (N.D.Cal.1972). Given the Act's intent to curb the power of overweening union officials, this is clearly the right result." [emphasis added]

The Second Circuit went on to discuss the laibility of individual defendants in relation to the liability of the unions,

> "Defendants also argue that union officials should have a defense to suits claiming violations of §101 if they have acted within the scope of their authority.... Plaintiff persuasively responds that such an exception cannot extend to acts of union officials who are abusing their positions, see Eisman, supra, 352 F.Supp. at 437, as the jury, by its award of punitive damages, necessarily found." (at 24)

The Second Circuit also discussed the question of punitive damages against the union.

> "We also disagree with the contention that punitive damages cannot be assessed for a violation of Title I of the Landrum-Griffin Act... we see no justification for [the district court's]

> ruling as a matter of law that the Union could not be held for punitive damages under the Landrum-Griffin Act.... If punitive damages can be awarded against other defendants, they can be awarded against unions as well. ... there is no need to demonstrate that the membership authorized nor ratified the acts giving rise to punitive damages. Rather the test is the 'complicity rule', followed by federal courts in pre-Erie days - that punitive damages may be imposed upon a corporation when superior officers order, participate or ratify, outrageous conduct." (citations omitted) (at 24-5)

To return to the case at hand. This Court's Novmeber opinion had stated that plaintiffs had alleged two wrongs by Dolgen. The first was that he filed false charges against them and the second allegation was that he manipulated the action of the trial body at the first two trials. This court went on to say that, in light of Morrissey, supra,

> "... the facts surrounding [Dolgen's] attendance at and/or his participation in the first two disciplinary trials (at which he is apparently alleged to have acted officially) are in dispute, the motion to dismiss the complaint against him as Manager of the Local must be denied." (at 39)

Again at the end of the opinion in summary this court said,

> "While the complaint must be dismissed against Dolgen in his private capacity, the lack of clarity in the complaint as to exactly which, if any, actions

> were taken by him under color of his union authority as Manager of the Local and the factual dispute concerning his role at the first two trials will require that the issue be resolved at trial. Thus, Mr. Dolgen remains a defendant in this suit, although in his official capacity ... his good faith in exercising his authority may become an issue bearing upon his federal liability,..."

The court then said, at p. 58-59,

> "... the allegations that Dolgen, in his private capacity, violated plaintiffs' rights under the LMRDA are dismissed.... The following issues remain for disposition:... whether Abe Dolgen, acting under color of and in abuse of his union office, contributed to the denial of plaintiffs' LMRDA rights and, if so, what proportion of plaintiffs' damages, if any, was due to his misconduct..."

In its order of January 11, 1978, in an attempt to clarify any confusion, this court issued an order which stated in part, "The federal claims may proceed against Dolgen only in his official capacity". By this the court meant to lay to rest any contention of plaintiffs that Dolgen could be held liable under LMRDA for actions done by him while acting as a mere union member and not as an union official. The court did not intend to reverse the Second Circuit's holding, quoted at length above, that individual defendants may be held liable if they are acting under color of union authority and are abusing their authority. Given the clear language of the Second Circuit's

opinion, and the use of nearly identical language by this court in its November opinion at page 39, the court assumed that this point was clear. Its order of January 11, 1978 was intended to clarify the question of Dolgen's liability for acts done while acting as a union member and not as a union official. At all times it was intended by the court that its November opinion rely on the law as stated by the Second Circuit in Morrissey, supra.

Judgment

(Caption Omitted)

These consolidated actions having come on for trial before the Court and a jury, Honorable Constance Baker Motley presiding, and the Court having decided certain issues in opinions dated November 14, 1977, January 11, 1978 and April 6, 1978, and during the course of trial, and certain remaining issues having been duly tried before a jury, and a special verdict having been rendered on April 27, 1978, a copy of which is annexed hereto as Exhibit "A", it is hereby

ORDERED and ADJUDGED that plaintiffs' motion for summary judgment that the suspensions imposed on them by defendant Amalgamated Ladies' Garment Cutters' Union, Local 10, ILGWU ("Local 10") and deferdant International Ladies' Garment Workers' Union, AFL-CIO ("ILGWU") are invalid, and that they did not receive a full and fair hearing at the first two union trials by Local 10 and on the first tow appeals by the ILGWU General Executive Board Appeal Committee in that plaintiffs were not allowed to make their own record of the pro-

ceedings and they were retried by the same tribunal; and it is further

ORDERED and ADJUDGED that defendant Abe Dolgen's ("Dolgen") motion to dismiss the allegations that he, in his private capacity as a union member, violated plaintiffs' rights under the Labor-Management Reporting and Disclosure Act ("LMRDA") is granted, and it is further

ORDERED and ADJUDGED that defendant Local 10's motion for summary judgment dismissing plaintiffs' claim of retaliation under the LMRDA, 29 U.S.C. §529, is denied, and it is further

ORDERED and ADJUDGED that defendant Dolgen's motion for summary judgment dismissing the malicious prosecution claim is denied; and it is further

ORDERED and ADJUDGED that complaint is dismissed against defendant the City of New York; and it is further

ORDERED and ADJUDGED that defendant Dolgen's cross-claim against defendant the City of New York is dismissed without prejudice in the exercise of the Court's discretion not to retain pendent jurisdiction over it; and it is further

ORDERED and ADJUDGED that defendant Doglen's motion for a directed verdict is denied; and it is further

ORDERED and ADJUDGED that defendant ILGWU's motion for a directed verdict is granted dismissing the complaint insofar as it requests monetary relief; and it is further

ORDERED, ADJUDGED AND DECREED that defendant Local and defendant ILGWU and their agents, servants and employees and all persons in active concert or participation with either of them are and each of them is hereby premanently enjoined and restraiend from giving any force or effect to any of the decisions and or disciplinary punishments, to wit: a certain decision and/or disciplinary punishment of suspension from participation in union activities imposed upon plaintiffs by the Executive Board of defendant Local 10 on or about February 25, 1975; a certain decision and/or disciplinary punishment of suspension from participation in union activities imposed upon plaintiffs by the Executive Board of defendant Local 10 on or about May 21, 1975; a certain decision and/or disciplinary punishment of suspension from attending membership meetings imposed upon plaintiffs by Trial Board of defendant Local 10 on or about January 29, 1976; and a certain "STATEMENT and DECISION" of defendant International's Special Appeal Committee dated April 11, 1977, although said defendants are not barred from holding a procedurally correct new trial; and it is further

ORDERED, ADJUDGED and DECREED that defendant Local 10 and defendant ILGWU and their agents, servants and employees and all persons in active concert or participation with any of them are and each of them is permanently enjoined and restrained from, on the basis of any of the aforesiad decisions, barring or excluding plaintiffs from attendance, or causing plaintiffs to be barred or excluded from attendance at, or from participation in, any membership meeting of Local 10; and it is further

ORDERED, ADJUDGED and DECREED that de-

fendant Local 10 and defendant ILGWU and their agents, servants and employees and all persons in active concert or participation with either of them are and each of them is hereby permanently enjoined and restrained from forbidding any accused member from either tape recording or recording by means of a competent stenographer at his own expense any disciplinary hearing to make a record for his own purposes, although said defendants and each of them is free to continue to regard the nonverbatim minutes taken by the secretary of its trial or appellate bodies as the "official" minutes of the proceeding; and it is further

ORDERED, ADJUDGED and DECREED that defendant Local 10 and defendant ILGWU and their agents, servants and employees and all persons in active concert or participation with any of them are and each of them is permanently enjoined and restrained from trying any accused member twice before the same trial body and from giving any force or effect to that portion of Article 22, Section 9 of the Constitution of the International Ladies' Garment Workers' Union, which permits such retrial by the same body; and it is further

ORDERED AND ADJUDGED that the plaintiff TOMAS ROSARIO recover from the defendant ABE DOLGEN the sum of $8,500.00 and the sum of $500.00 with interest thereon at the rate of six percent per annum from February 25, 1975 to the date of this judgment, totalling $597.81, the two aforesaid sums totalling $9097.81, and it is further

ORDERED AND ADJUDGED that the plaintiff OVIDIO VEGA recover from the defendant ABE DOLGEN the sum of $7,500.00 and the sum of $500.00 with interest thereon at the rate of six percent per annum from February 25,

1975 to the date of this judgment, totalling $597.81, the two aforesaid sums totaling $8,097.81, and it is further

ORDERED AND ADJUDGED that the plaintiff RAY CABEL recover from the defendant ABE DOLGEN the sum of $2,500.00 and the sum of $500.00 with interest thereon at the rate of six percent per annum from February 25, 1975 to the date of this judgment, totalling $597.81, the two aforesaid sums totalling $3,097.81, and it is further

ORDERED AND ADJUDGED that the plaintiff TOMAS ROSARIO recover from the defendant AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, I.L.G.W.U., the sum of $10,000.00 and the sum of $1,000.00 with interest thereon at the rate of six percent per annum from May 21, 1975 to the date of this judgment, totalling $1,181.64, the two aforesaid sums totalling $11,181.64, and it is further

ORDERED AND ADJUDGED that the plaintiff OVIDIO VEGA recover from the defendant AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, I.L.G.W.U. the sum of $10,000.00 and the sum of $1,000.00 with interest thereon at the rate of six percent per annum from May 21, 1975 to the date of this judgment, totalling $1,181.64, the two aforesaid sums totalling $11,181.64, and it is further

ORDERED AND ADJUDGED that plaintiff RAY CABEL recover from the defendant AMALGAMATED LADIES' GARMENT CUTTERS' UNION , LOCAL 10, I.L.G.W.U., the sum of $10,000 and the sum of $1,000.00 with interest thereon at the rate of six percent per annum from May 21, 1975 to the date of this judgment, totalling $1,181.64, the two aforesaid sums totalling $11,181.64, and it is further

ORDERED AND ADJUDGED that plaitniffs' reasonable attorneys' fees incurred in the prosecution of the federal causes of action in this suit be paid out of the treasury of the AMAMLGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, I.L.G.W.U., in an amount to be fixed by the court upon application therefor by counsel for the plaintiffs with notice to counsel for the defendants, and it is further

ORDERED AND ADJUDGED that the costs of this action and plaintiffs' necessary disbursements be and they hereby are awarded to plaintiffs against the defendants.

Dated: June 11, 1978
New York, New York

SO ORDERED

S/ CONSTANCE BAKER MOTLEY
Constance Baker Motley, U.S.D.J.

Judgment entered 6/23/78

RAYMOND F. BURGHARDT
Clerk

(caption omitted)

SPECIAL QUESTIONS FOR THE JURY

LIABILITY

1. Have plaintiffs Rosario and Vega sustained their burden of proof on their claim that Dolgen had them falsely arrested on January 29, 1975?

/✓/ YES /___/ NO

2. Have plaintiffs Rosario and Vega sustained their burden of proof on their claim of malicious prosecution against Dolgen?

/✓/ YES /___/ NO

3. Have plaintiffs Rosario, Vega and Cabel sustained their burden of proof on their federal claim that the union disciplined them, not for what they did in Dolgen's office on January 29, 1975, but because they were dissenting union members?

/___/ YES /✓/ NO

4. Have plaintiffs Rosario, Vega and Cabel sustained their burden of proving that Dolgen, acting under color of his authority as manager of the union, and not in his individual capacity as a complaining union member, dominated and manipulated the trials and their resultant punishment in order to get revenge against plaintiffs?

/✓/ YES /___/ NO

5. Have plaintiffs Rosario, Vega and Cabel

sustained their burden of proof on their second federal claim that they were injured by Local 10's violations of federal law which the court found had occurred with respect to the second union trial and by the imposition of improper punishment of suspension from attendance at union meetings for various periods of time?

/✓/ YES /___/ NO

6. Have plaintiffs Rosario, Vega and Cabel sustained their burden of proof of their second federal claim that Dolgen, acting under color of his authority as manager of the union, but in abuse of that authority as manager of the union, contributed to the violations of federal law as were described in Question 5 above?

/___/ YES /✓/ NO

COMPENSATORY DAMAGES

7. If you answered Yes to Question 1, finding Dolgen liable to Rosario and Vega for false arrest, what amount do you award the plaintiffs as compensation for the harm they suffered?

ROSARIO $ 1000

VEGA $ 1000

8. If you answered Yes to Question 2, finding Dolgen liable to Rosario and Vega for malicious prosecution, what amount do you award them as compensation for the harm that they suffered?

ROSARIO $ 2500

VEGA $ 1500

9. If you answered Yes to Question 3, finding Local 10 liable to the plaintiffs Rosario, Vega, and Cabel for retaliation against them because of their dissident status, what amount do you award to the plaintiffs for the harm they suffered against Local 10?

ROSARIO $ -

VEGA $ -

CABEL $ -

10. If you find in answering Question 4 that Dolgen, acting under color of his authority as manager, but in abuse of his authority, contributed to the harm that plaintiffs suffered as a result of retaliation visited upon them by Local 10, what amount do you award the plaintiffs for the harm they suffered against Dolgen?

ROSARIO $ 500

VEGA $ 500

CABEL $ 500

11. If you answered Yes to Question 5, finding Local 10 liable to the plaintiffs because of the violations of federal law which the court found had occurred in conection with the second trial and because of the illegal suspension from attending union meetings, what amount do you award plaintiffs

for the harm they suffered against Local 10?

ROSARIO $ 1000

VEGA $ 1000

CABEL $ 1000

12. If your answer is Yes to Question 6, with respect to federal law violations and Dolgen's involvement, what amount do you award plaintiffs for the harm they suffered against defendant Dolgen?

ROSARIO $ -

VEGA $ -

CABEL $ -

PUNITIVE DAMAGES

13. If you answered Yes to Question 1 on the false arrest claim, do you find that Dolgen acted with reckless or wanton indifference to plaintiffs' rights such that an award of punitive damages is appropriate?
If so, how much do you award plaintiffs?

ROSARIO $ 2500

VEGA $ 2500

14. If you answered Yes to Question 2 on the malicious prosecution claim, do you find that Dolgen acted with reckless or wanton indifference to plaintiffs' rights such that an award of punitive damages is appropriate? If

so, how much do you award plaintiffs from Local 10?

ROSARIO	$ -
VEGA	$ -
CABEL	$ -

16. If you assessed compensatory damages against Dolgen in answer to Question 10 on the retaliation claim, do you further find that Dolgen acted in reckless or wanton indifference to plaintiffs' rights such that an award of puntive damages is appropriate? If so, how much do you award plaintiffs?

ROSARIO	$ 2500
VEGA	$ 2500
CABEL	$ 2500

17. If you assessed compensatory damages against Local 10 under Question 11 with respect to federal law violation, do you further find that Local 10 acted with reckless or wanton indifference to plaintiffs' rights such that an award of punitive damages is appropriate? If so, how much do you award plaintiffs?

ROSARIO	$ 10,000
VEGA	$ 10,000
CABEL	$ 10,000

18. If you assessed compensatory damages against Dolgen under Question 12 on

his involvement in federal law violation, do you further find that Dolgen acted with reckless or wanton indifference to plaintiffs' rights such that punitive damages are appropriate? If so, how much do you award plaintiffs?

ROSARIO	$ -
VEGA	$ -
CABEL	$ -

Denial of Petition for Rehearing

United States Court of Appeals
SECOND CIRCUIT

At a Stated Term of the United States Sourt of Appeals, in and for the Second Circuit, held in the United States Court House, in the City of New YOrk, on the twentieth day of November, one thousand nine hundred and seventy nine.

Present: Walter R. Mansfield

Present: Hon. Walter R. Mansfield

Hon. Leonard P. Moore
Circuit Judges

Hon. Inzer B. Wyatt,
District Judge

(Caption Omitted)

A petition for a rehearing having been filed by counsel for the appellee Tomas

Rosario

Upon consideration therof, it is

Ordered that said petition be and hereby is DENIED

s/ A. DANIEL FUSARO
A. DANIEL FUSARO, Clerk

Supreme Court, U. S.
FILED
APR 5 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1378

TOMAS ROSARIO, OVIDIO VEGA and RAY CABEL,
Petitioners,

v.

AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, I.L.G.W.U., ABE DOLGEN, Individually and as Manager of AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, I.L.G.W.U., and INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, ILGWU

SIMON H. RIFKIND
JAY TOPKIS
345 Park Avenue
New York, New York 10022
(212) 644-8000
Attorneys for Respondent Amalgamated Ladies' Garment Cutters' Union, Local 10, ILGWU

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
RICHARD M. ZUCKERMAN
Of Counsel

April 4, 1980

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, ILGWU

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Motley, D.J.), filed November 14, 1977 is reported at 441 F. Supp. 657, and appears in the Appendix to the Petition at 47a. The District Court issued two clarifying amendments to its opinion, dated

January 11 and April 7, 1978, which are not reported, but which appear at 107a and 108a respectively.

The opinion of the United States Court of Appeals for the Second Circuit (Moore, Mansfield, C.JJ., Wyatt, D.J.), filed July 17, 1979, is reported at 605 F.2d 1228, and appears at 1a. The order of the Court of Appeals denying rehearing, filed November 20, 1979, appears at 123a. The order of the Court of Appeals denying rehearing *en banc,* also filed November 20, 1979, does not appear in the Appendix to the Petition.

Jurisdiction

This Court lacks jurisdiction because the petition is untimely.

Petitioners filed what would have been a timely petition for certiorari on February 19, 1980 (the "February 19 petition"). However, the Clerk of this Court rejected the February 19 petition, pursuant to Rule 39 of this Court, apparently because the copy of the District Court opinion it contained was illegible and printed in type smaller than 11-point (having been photostatically reproduced from Federal Supplement). Petitioners were permitted to file a superseding petition to correct that error, which they did, on March 7, 1980 (the "March 7 petition"). However, rather than simply correcting the printing error, the March 7 petition substantially revised the February 19 petition. The Statement of the Case is entirely new (different not only from the February 19 petition, but also from the facts found below). The Argument was revised on 15 of its 24 pages. And one of the Questions Presented (number 4)

was modified by a reference to an additional statute (29 U.S.C. § 529), which was also added to the Statutes Involved.

Because the March 7 petition presents new and different arguments, it should be docketed as of the date it was actually filed, rather than the date of the February 19 petition.* On that basis, the petition is untimely, and this Court does not have jurisdiction under 28 U.S.C. § 1254(1).

Questions Presented

The petition asks this Court to review the following questions:

1. Where respondent-union has the right, under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* ("LMRDA" or "Landrum-Griffin Act"), to suspend or expel petitioner-union members as a disciplinary sanction, may the union impose the lesser sanction of suspension of the right to attend membership meetings for a fixed period of time?

The Court of Appeals, reversing the District Court, held that the union may impose the lesser-included sanction.

2. Did a notice stating that respondent-union would conduct a "hearing *de novo*" on the appeal of charges against petitioners, union members, and that the members would be accorded the right to be represented by counsel, to present evidence, to examine and to cross-examine witnesses,

---

* Had the March 7 petition merely corrected the printing error, it could have been docketed as of February 19, under Rule 39(4).

and to make opening and closing statements, give the members adequate notice that the hearing would be a new trial of the charges against them and not merely an appellate review of their previous trial?

The Court of Appeals, reversing the District Court, held that the union members were given "ample notice" of the nature of the proceeding.

3. Was the final union disciplinary hearing given to petitioners a "full and fair hearing"?

The District Court held that the hearing was: "full and fair hearing," and, indeed, "went beyond the requirements of current law." (75a). Petitioners did not contest that finding in the Court of Appeals. Thus, this question is not properly before this Court.

4. Are petitioners entitled to compensatory damages for violation of their procedural rights under the LMRDA, where they introduced no proof that they sustained any damages, and did not ask to be awarded nominal damages?

The Court of Appeals set aside the jury award of compensatory damages, holding that petitioners failed to prove that they sustained any damages.

5. Where a jury is instructed, without objection, that punitive damages may not be awarded in the absence of compensatory damages, and the compensatory damage award is set aside for lack of proof, may the punitive damage award be allowed to stand?

Having set aside the award of compensatory damages, the Court of Appeals also set aside the award of punitive damages.

• • •

These questions are not worthy of certiorari: the decisions below are clearly correct, and there are no conflicts among the Circuits.

Statute Involved

This case involves the following provisions of the LMRDA:

29 U.S.C. § 402(*o*):

> "Member" or "member in good standing", when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

29 U.S.C. § 411:

> *Bill of rights; constitution and bylaws of labor organizations*
>
> (a)(1) *Equal Rights.*—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(a)(2) *Freedom of speech and assembly.*—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

* * *

(a)(5) *Safeguards against improper disciplinary action.*—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) *Invalidity of constitution and bylaws.*—Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

Statement of the Case

Petitioners are members of Respondent Amalgamated Ladies Garment Cutters' Union, Local 10, ILGWU ("Local 10") who have opposed the union's administration for several years. In this action, they charged that Local 10 and the ILGWU, its parent union, disciplined them in violation of the LMRDA. Petitioners' claims arose out of a

series of union disciplinary trials held on a charge, filed by respondent Abe Dolgen, the former manager of Local 10, that petitioners had disrupted union activities by conducting a "sit-in" in Dolgen's office on January 29, 1975 (4a).

Petitioners made two substantive claims against Local 10: that the charges brought against them were false, and that the charges were filed in retaliation for their criticism of Local 10's administration, and thus in violation of their protected "free speech" rights under the LMRDA (51a). One of the substantive claims was rejected by the District Court, and the other by the jury. Finding that there was "some evidence" that petitioners had disrupted union activities, the court granted summary judgment dismissing their claim that the union charges were false (100a-103a). And the jury explicitly found, as part of its special verdict, that petitioners had failed to prove that they were disciplined in retaliation for their exercise of protected rights, rather than because of their "sit-in" (Special Question No. 3, 118a). Petitioners did not appeal these determinations to the Court of Appeals.*

The issues raised in the Court of Appeals, and now before this Court,** arose solely from petitioners' claim that

* In their Statement of the Case, petitioners renew their claim that the union charges were "false" and infer that the union charges were intended to punish them for their dissident activities (7). That is an accurate characterization of the complaint but a wildly inaccurate statement of the facts found by the courts below.

** The Court of Appeals ruled in petitioners' favor on two additional issues, holding that petitioners had the right to tape-record their union disciplinary trials (19a-26a) and that retrial of union disciplinary charges may not be held before the same panel (26a-29a). Respondents do not regard those questions as being worthy of certiorari, and therefore did not cross-petition for certiorari on those issues.

Local 10 violated their *procedural* rights in the following respects:

The District Court held that the discipline imposed upon petitioners—suspension from the right to attend Local 10's quarterly membership meetings for 18 months for petitioners Rosario and Vega and for 12 months for Cabel—was not permitted by the LMRDA, even though the LMRDA gives unions the explicit right to suspend and even expel members as a disciplinary sanction (72a-74a). The Court of Appeals reversed, holding that the union was allowed to impose the lesser-included sanction (16a).

The District Court held that petitioners' final union disciplinary hearing was a "full and fair hearing"—and indeed "went beyond the requirements of current law" (75a)—in all respects except that the notice given to petitioners was inadequate (75a-76a), because it did not adequately inform them that the hearing would be a new trial, rather than merely an appellate review of the earlier trial (77a-79a). The Court of Appeals reversed, holding that the notice was "ample" (30a). The Court of Appeals was not asked to, and did not, review the District Court holding that—in all other respects—the final union disciplinary trial was a "full and fair hearing."

The jury awarded each of the three plaintiffs $1,000 in compensatory damages and $10,000 in punitive damages against Local 10 (121a-122a). The Court of Appeals set aside the compensatory damage award for lack of proof (32a-33a). The Court of Appeals also set aside the punitive damage award, noting that petitioners did not except to the District Court instruction that "punitive damages cannot be awarded in the absence of compensatory damages" (33a).

Reasons for Denying the Writ

The petition for certiorari should be denied because the Second Circuit's decision is clearly correct, there are no conflicts between the Circuits, and the questions presented are insubstantial and not worthy of certiorari.

A. The punishment imposed upon petitioners—suspension from the right to attend membership meetings for a fixed period of time—is permitted by the LMRDA.

Because the District Court rejected petitioners' claims that the union charges were false, and because petitioners failed to prove that they were disciplined in retaliation for their exercise of protected rights, there is no question that, after a "full and fair hearing," the union could have suspended or expelled petitioners from membership—as explicitly authorized by the LMRDA, 29 U.S.C. § 411(a)(5).

Even so, petitioners claim that the union may not impose the lesser sanction of suspension of the right to attend membership meetings. The only support which they offer for that position is a tortured construction of the LMRDA: that a disciplined union member remains a "member," as defined in 29 U.S.C.A. § 402(*o*), and accordingly, must enjoy the rights guaranteed by Section 411(a) to "[e]very member of a labor organization," including the right "to attend membership meetings." 29 U.S.C. § 411(a)(1).

The Court of Appeals correctly held that this literalistic construction defies both the statute and common sense. The LMRDA "does not restrict the form of discipline a union

may impose" (16a). Moreover, "common sense dictates that a union should have the option of imposing a sanction less drastic than complete suspension when a member disrupts the conduct of union meetings or business." (18a). The Court of Appeals concluded,

> "The suspension of a union member's right to attend meetings cannot imperil union democracy or oppress the union member when the union would be entitled to suspend the member from membership altogether." (18a).

The two other Circuits which have expressly considered this issue are in agreement with the decision below. In *Reyes* v. *Laborers' Int'l Union,* 464 F.2d 595, 597 (10th Cir. 1972), *cert. denied,* 411 U.S. 915 (1973), the Tenth Circuit held that suspension of the right to attend union meetings for three years was proper discipline "expressly recognized in 29 U.S.C. § 411(a)(5)." And in *Airline Maintenance Lodge 702* v. *Loudermilk,* 444 F.2d 719, 723 (5th Cir. 1971), the Fifth Circuit held that, where a union member seeks to support a rival union, the union may not fine him, but it may "choose to expel him or to bar him from meetings and the like."

Petitioners argue that the decision below is in conflict with the Ninth Circuit's decision in *Stachan* v. *Weber,* 535 F.2d 1202 (9th Cir. 1976). The Second Circuit succinctly disposed of the alleged conflict:

> "*Stachan* v. *Weber,* 535 F.2d 1202 (9th Cir. 1976), cited by the district court and relied upon by appellees [petitioners], is of no help. There the court simply ruled that union members who had refused to salute the flag and recite the pledge of allegiance at the open-

> ing of union meetings could not be excluded, since their conduct was protected under the free speech clause of § 101, 29 US.C. § 411(a)(2). Although the court's statement that the 'exclusion would clearly violate the equal rights section of the Act,' 535 F.2d at 1203, might conceivably be interpreted as prohibiting such a form of discipline, the more plausible interpretation is that the union could not exclude members from union meetings without first conducting a 'full and fair' hearing on written charges brought under the union's constitution or by-laws." (15a-16a).

B. The notice of petitioners' final union trial was adequate.

The Second Circuit's decision of the second question raised by the petition—whether the notice of petitioners' final union hearing adequately informed them that the proceeding would be a trial and not merely an appellate review —looked to the substance of that notice and found that:

- Petitioners received the notice well in advance of the hearing date (30a).
- The notice told petitioners that the union would conduct a "hearing *de novo*" (30a).
- The notice told petitioners that they could be present and represented by counsel (30a).
- The notice told petitioners that they could present documentary and testimonial evidence (30a).
- The notice told petitioners that they could examine and cross-examine witnesses (30a).
- The notice told petitioners that they could make opening and closing statements (30a).

The Court of Appeals thus concluded that, although the notice described the proceeding as a "hearing *de novo* on appeal,"

> "the substance of the message was clear: appellees [petitioners] were being offered a trial with all of the due process rights previously denied." (30a).

Petitioners do not cite a single case, decided by this Court or any other federal court, in conflict with this decision.

Not only is the decision correct, but the question presented is hardly appropriate for this Court's consideration: a decision on the adequacy of this particular notice, issued by the union after a tortuous chain of events, including three prior union trials, would necessarily hinge on the peculiar factual context of this case, and could be of little precedential value.

C. The issue of whether petitioners' final union trial was a "full and fair hearing" was not raised in the Court of Appeals, and is not properly before this Court.

In addition to arguing that the notice of the final union trial was inadequate, petitioners claim that the trial itself was not a "full and fair hearing" (24-28). That issue was not raised in the Court of Appeals and therefore is not properly before this Court. *Ramsey* v. *United Mine Workers,* 401 U.S. 302, 312 (1971).

When the fairness of the final union trial was raised in the District Court, the court held that the union

> "went beyond the requirements of current law in seeking to ensure that plaintiffs received a fair hearing attended by extensive substantive and procedural safeguards" (75a).

The District Court further held that the *sole* defect was the inadequate notice (75a). That was the only issue raised in the Court of Appeals; petitioner-union members did not ask the Court of Appeals to review the District Court's decision that the hearing itself was fair.* Thus, that issue may not be raised here.

D. Petitioners were not entitled to damages in the absence of any proof of damages.

Finally, petitioners argue that the Court of Appeals erred in vacating the awards of compensatory and punitive damages.

The compensatory damage award was set aside for the simple reason that petitioners did not introduce *any* evidence that their "mental anguish"—the only damage claimed—was caused by respondents' wrongdoing. This is consistent with the well-settled principle that damages may not be given for any injury unless there is *some* proof that the injury was *directly caused* by the violation of law found by the court. *Yanity* v. *Benware,* 376 F.2d 197, 200 (2d Cir.), *cert. denied,* 389 U.S. 874 (1967) (rejecting a claim for damages under the LMRDA, because "The connection between defendant's alleged wrongful act and the injury to

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* Petitioners improperly suggest, in their Questions Presented (3) and Argument (24) that the Court of Appeals stated that the final union trial was "hardly conducive to impartial resolution of the issues" and presented "the obvious danger that [the decision-makers] will not be fair and impartial" (3, 24). The Court of Appeals made these statements about the fact that the second union trial was held before the same panel that heard the first union trial. The Court of Appeals did not make these—or any other—statements about the final union trial, because the fairness of that trial was not raised in that Court.

plaintiffs is . . . too speculative and too remote as a matter of law to permit an award of damages.'')*

Petitioners claim that the decision below is in conflict with the Ninth Circuit's decision in *Addison* v. *Grand Lodge of the Int'l Ass'n of Machinists,* 318 F.2d 504, 508 (1963). However, *Addison* merely held that a member's wrongful discipline may give rise to a cause of action for damages. It did not hold that the member was entitled to damages in the absence of proof that he sustained damages.**

The Second Circuit also properly vacated the punitive damage award, stating

> ''Nor did appellees [petitioners] except to Judge Motley's instruction that punitive damages cannot be awarded in the absence of compensatory damages'' (33a).

Petitioners suggest that this is a ''radically new'' construction of Rule 51 of the Federal Rules of Civil Procedure. It is not. It is instead the language of the rule:

> ''No party may assign as error the giving or the failure to give an instruction unless he objects thereto before

* In *Carey* v. *Piphus,* 435 U.S. 247, 264 (1978), this Court applied the same rule to civil rights actions under 42 U.S.C. § 1983:

> "although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused."

** Had the Court of Appeals not vacated the damage award in its entirety, it would have been necessary to remand for a new trial because the award was based, in part, on the District Court's finding that the union had imposed an improper punishment (suspension of the right to attend union meetings)—a finding later reversed by the Court of Appeals.

> the jury retires to consider its verdict . . . .'' Rule 51, *Fed. R. Civ. P.*

Instructions to which there are no objections thus become the law of the case; they may not be re-examined unless there was ''plain error'' or a ''substantial miscarriage of justice''—neither of which occurred here. *Cohen* v. *Franchard Corp.,* 478 F.2d 115, 124 (2d Cir.), *cert. denied,* 414 U.S. 857 (1973).

Moreover, if this Court were to grant certiorari on this issue, it would have to address the two legal assumptions on which the jury instruction was based: whether punitive damages may be awarded in the absence of compensatory damages, and whether punitive damages may be awarded, at all, under the LMRDA in light of this Court's decision in *Int'l Brotherhood of Electrical Workers* v. *Foust,* —— U.S. ——, 99 S. Ct. 2121 (1979), that such damages may not be awarded against a union in fair representation cases under the National Labor Relations Act.* Those issues—which were not briefed or argued below—should not be considered, for the first time, in this Court.

* In *Foust,* this Court specifically stated that it was "express[ing] no view on the propriety of punitive awards under the Landrum-Griffin Act." —— U.S. at ——, n.9, 99 S. Ct. at 2125, n.9.

Conclusion

For the foregoing reasons, the petition for certiorari should be denied.

Dated: New York, New York
April 4, 1980

Respectfully submitted,

SIMON H. RIFKIND
JAY TOPKIS
345 Park Avenue
New York, New York 10022
(212) 644-8000
Attorneys for Respondent
Amalgamated Ladies' Garment
Cutters' Union, Local 10, ILGWU

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
RICHARD M. ZUCKERMAN
Of Counsel

Supreme Court, U. S.
FILED
NOV 14 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Case No. 79-1378

TOMAS ROSARIO, OVIDIO VEGA and
RAY CABEL,

Petitioners,

-against-

AMALGAMATED LADIES' GARMENT
CUTTERS' UNION, LOCAL 10, I.L.G.W.U.,
et al.,

Respondents.

PETITIONERS' REPLY BRIEF

BURTON H. HALL
401 Broadway
New York, N.Y., 10013

(212) 431-9114

Attorney for Petitioners

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Respondents.

PETITIONERS' REPLY BRIEF

Aside from arguments previously raised (and thus not discussed in this reply brief), Respondent Local 10, in its brief, raises a challenge to this Court's jurisdiction, makes three mis-statements of fact as to what the District Court found or decided, and makes one false accusation of impropriety. This reply brief responds to each of

those five matters.

A. Respondent's "jurisdictional" argument is without merit.

Under the heading "Jurisdiction," Local 10 argues (pp. 2-3) that the Court lacks jurisdiction because the petition is untimely. Since Rule 22's time requirements are not jurisdictional but may be waived, Local 10 cites 28 U.S.C. §1254(1) instead of Rule 22. But §1254(1) contains no time requirements at all. Thus Local 10's "jurisdictional" argument is without merit.

Local 10 does not claim prejudice and cannot. Counsel were advised immediately of the changes in the text of the Petition.

The changes in the text were made after telephone conversation with the Clerk, who advised that it was permissible, in preparing the corrected petition for resubmission, to make whatever textual and other changes might be desired. Since typing of the materials in the Appendix (in order to

meet the requirements for resubmission) required retyping of the text as well (in order to give new, corrected page citations to the Appendix), Petitioners deemed it desirable to make textual improvements.

Petitioners submit that the Clerk's advice, permitting such changes, was correct. If it was not, Petitioners ask for an opportunity to move for waiver of the time requirements of Rule 22(1) or that (alternatively) this brief be deemed such a motion.

B. The jury's findings establish (1) that Dolgen's charges were false and (2) that Dolgen prosecuted petitioners for their dissident activities.

Local 10 asserts (p.7,fn.*) that the facts stated at page 7 of the petition (and summarized in the point heading above) are "wildly inaccurate" as a statement of facts found by the courts below. It is in error, as will be pointed out below.

1. The charges were false. Under New York law, one who "remains unlawfully" on

a premises is guilty of criminal trespass (see: 38a, fn.25). Thus the jury, in deciding upon petitioners' claims of false arrest, focussed on the question whether they had been asked to leave Dolgen's office and had refused, as Dolgen asserted and they denied. It upheld the false arrest claims (Sp.Q.#1; 118a). As the Court of Appeals noted (App. 38a), it "appears to have rejected Dolgen's version."

Dolgen's intra-union charges were premised on the same assertion: that he had asked petitioners to leave his office but they refused. Thus the jury's finding on the false arrest claims establishes that those charges were false.

2. Dolgen prosecuted petitioners to punish them for their dissident activities. The jury found that, although Local 10 did not act against petitioners because they were dissenting union members (Sp.Q.#1), Dolgen did (Sp.Q.#2; 118a). Specifically,

it found that Dolgen manipulated and dominated the union trials and their resultant punishment "in order to get revenge against plaintiffs."

Dolgen's "revenge" was for petitioners' having opposed and criticized him within the union.

Plainly, the statement given in the Petition, as to the facts, is an accurate statement of what the jury found as fact.

C. The District Court did not dismiss the allegation that Dolgen's charges were false.

Respondent Local 10 states as fact (7) that the District Court granted summary judgment "dismissing [petitioners'] claim that the union charges were false." That statement is in error.

The Court, with no prompting from petitioners, interpreted the Complaint's allegation that the charges were "false" to state a claim of procedural unfairness against Local 10 on the ground that the

trial body's decision was unsupported by any evidence (101a). Such a claim, of course, would have been meritless, since there had been "some evidence" (Dolgen's, for example) to support the charges. Therefore the Court held (102a) that

> "... the Local is entitled to a summary judgment that the trials were not thereby 'unfair.'"

Local 10, in its brief, undertakes to convert this ruling into a dismissal of the allegation that the charges were, in fact, false. In attempting to do so, it misstates the District Court's ruling.

D. The District Court did not find that the Special Appeal Committee was impartial, or that the inadequate notice was the only defect in the fourth union trial.

Local 10 maintains (pp. 8,12-13) that the District Court found the fourth union trial fair except that the notice was inadequate. It did not.

The Court did find (75a) that, despite the promise of elaborate procedures,

> "... the [petitioners] nevertheless did not receive the 'full and fair hearing' mandated by statute,"

since they were not notified that the hearing was to be a trial.

The Court never explored, nor did it have reason to explore (in view of its finding), whether there was other unfairness: specifically, whether there was prejudgment, bias or non-impartiality on the part of the members of the trial body. Thus it made no finding on that issue. It found that the promised procedures went beyond the law's requirements -- not that the hearing met (or, but for absence of notice, would have met) the law's requirements as to fairness.

The Court of Appeals did rule as to the law's requirements of fairness when, after noting that the fourth trial body was composed of ILGWU vice presidents (12a) and what such composition implied as to impartiality (27a), it held that

the fourth hearing "must be viewed as a full and fair hearing within the meaning of the Act" (31a). It is this ruling that petitioners challenge in their third point heading (Pet. 24).

E. Respondent falsely accuses Petitioners of "improperly suggest[ing]" something never suggested.

At page 13, fn.*, Local 10 taxes Petitioners with "improperly suggest[ing]" that the Court of Appeals had stated that the fourth trial was hardly conducive to impartial resolution of the issues.

Petitioners neither said nor suggested any such thing. What they did say (Pet. 24) was that

> "the characteristics of [the fourth] hearing were such, as the Court had noted in discussing the second trial (App. 27a), as to make the trial atmosphere 'hardly conducive to impartial resolution of the issues' and to present 'the obvious danger that [the decision makers] will not be fair and impartial.'"
>
> (Emphasis added.)

Discussing the second trial, the Court of Appeals had commented that when a union trial has the following characteristics, the atmosphere is hardly conducive to impartiality (27a):

(a) union officials sit in judgment

(b) upon charges arising out of internal political differences

(c) brought by a fellow official

(d) against a member critical of their policies.

And, said the Court, when the decision makers are, in addition, laymen untrained in professional commitment to disinterested appraisal of the evidence, there is the "obvious danger" they will not be impartial.

Petitioners argued (and argue) that, since the fourth trial had the above characteristics, the comment is applicable

to the fourth trial. In so arguing, they have been careful not to suggest that the comment was made of or concerning the fourth trial -- and have emphasized instead that it was made in the course of discussing the second trial, and even in that discussion its subject was abstract: a trial having certain characteristics.

In short, Local 10 has "improperly suggest[ed]" a groundless accusation against Petitioners.

Respectfully submitted,

BURTON H. HALL
401 Broadway
New York, N.Y., 10013

(212) 431-9114

Attorney for Petitioners